FILED
NOV 22 1974
MICHAEL RODAK, JR., CLERK

No. 74-634

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT H. BORK,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
PAUL L. FRIEDMAN,
Assistant to the Solicitor General,
PETER M. SHANNON, Jr.,
IVAN MICHAEL SCHAEFFER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional provision, statute and rule involved	2
Statement	4
Reasons for granting the writ	12
Conclusion	26
Appendix A	1a
Appendix B	25a
Appendix C	26a

CITATIONS

Cases:

California v. *Byers*, 402 U.S. 424	15
Couch v. *United States*, 409 U.S. 322	17
Dennis v. *United States*, 384 U.S. 855	15
Giles v. *Maryland*, 386 U.S. 66	24
Harris, Matter of, 221 U.S. 274	17
Harris v. *New York*, 401 U.S. 222	12, 14, 18–19, 20
Hickman v. *Taylor*, 329 U.S. 495	25
Jencks v. *United States*, 353 U.S. 657	24
McGautha v. *California*, 402 U.S. 183	14, 18, 19
Miranda v. *Arizona*, 384 U.S. 436	20
Murphy v. *Waterfront Commission*, 378 U.S. 52	17
Palermo v. *United States*, 360 U.S. 343	24
People v. *Damon*, 24 N.Y. 2d 256, 247 N.E. 2d 651, 299 N.Y.S. 2d 830	15, 17
People v. *Sanders*, 110 Ill. App. 2d 85, 249 N.E. 2d 124	15, 25
Raffel v. *United States*, 271 U.S. 494	18
Saunders v. *United States*, 316 F. 2d 346	25
Schmerber v. *California*, 384 U.S. 757	15, 17
State v. *Montague*, 55 N.J. 387, 262 A. 2d 398	15, 22, 25
State ex rel. Sikora v. *District Court*, 154 Mont. 241, 462 P. 2d 897	21
United States v. *Dionisio*, 410 U.S. 1	15
United States v. *Mara*, 410 U.S. 19	15

Cases—Continued

	Page
United States v. *Nixon*, No. 73–1766, decided July 24, 1974	14, 21
United States v. *Wright*, 489 F. 2d 1181	15, 16
Walder v. *United States*, 347 U.S. 62	19
Wardius v. *Oregon*, 412 U.S. 470	14, 15, 19
Williams v. *Florida*, 399 U.S. 78	14, 19, 20, 21

Constitution and statutes:

United States Constitution, Fifth Amendment	2, 11, 13, 14, 16, 17, 19, 21
Jencks Act, 18 U.S.C. 3500	2–3, 12, 23, 24
18 U.S.C. 2113(a)	5
18 U.S.C. 2113(d)	5
18 U.S.C. 4208(a)(2)	5

Miscellaneous:

Advisory Committee Note to Rule 16, Federal Rules of Criminal Procedure, 18 U.S.C. App., pp. 4493–4494	23–24
Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966)	13
H.R. 5463, 93d Cong., 2d Sess	25
Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L. J. 1276 (1966)	24
Rule 16, Federal Rules of Criminal Procedure	3–4, 9, 11, 12, 23
Rule 612, Proposed Federal Rules of Evidence (56 F.R.D. 276)	25

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-captioned case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 501 F. 2d 146.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1974 (App. B, *infra*). On September 23, 1974, the court of appeals denied a petition for rehearing with a suggestion for rehearing *en banc* (App. C, *infra*). By order of October 12, 1974, Mr. Justice

Douglas extended the time for filing a petition for a writ of certiorari to and including November 22, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in a criminal trial, after the completion by the government of its case-in-chief and following the direct examination of a defense witness, the court may require the defense to provide the prosecutor, for the purpose of possible impeachment on cross-examination, prior written statements of the defense witness relating to the subject matter of his testimony.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

2. 18 U.S.C. 3500 (the Jencks Act) provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as

> hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> * * * * *
>
> (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

3. Rule 16 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (B) OTHER BOOKS, PAPERS, DOCUMENTS, TANGIBLE OBJECTS OR PLACES
>
> * * * Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of

statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

(C) DISCOVERY BY THE GOVERNMENT

If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, respon-

dent and two others [1] were convicted of bank robbery, in violation of 18 U.S.C. 2113(a), and assault with a dangerous weapon in the commission of the robbery, in violation of 18 U.S.C. 2113(d). Each defendant was sentenced to a term of twenty-five years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2). Over the dissent of one judge, the court of appeals reversed respondent's conviction (App. A, *infra*).[2]

1. On the morning of February 6, 1973, at approximately 11:30 a.m., four men entered and robbed a branch of the Crocker National Bank in Los Angeles, California (Tr. 13–25, 185–186). One, identified as co-defendant Brown, jumped behind the tellers' windows and moved down the line of cages, collecting a total of $4,031 from the cash drawers (Tr. 18–20, 187–194). Meanwhile, brandishing weapons and guarding the customers and bank employees from various positions in the bank, the other three men assured that no one would interfere with Brown's labors. The man identified as respondent, armed with a revolver, performed his part in the robbery while standing directly beneath the bank's automatic surveillance camera and thus was the only one of the robbers whose activities in the bank were not captured on film for the jury to view (Tr. 22–23, 192–194, 323–324).

[1] Indicated, tried, and convicted with respondent were Tommie Louis Brown and Virgil David Swain. A fourth person, Jonathan Ray Nobles, was also indicted but was a fugitive at the time of trial.

[2] The court unanimously affirmed the convictions of Brown and Swain.

Accordingly, at trial the evidence against respondent consisted exclusively of the testimony of two eyewitnesses, Peter Van Gemeren, a bank teller (Tr. 22–23), and Gary Hoffman, a salesman visiting the bank (Tr. 323–325, 420–421). Van Gemeren testified that during the robbery he observed respondent for approximately one minute from a distance of twenty feet and that he gave a detailed description of him to the F.B.I. (Tr. 61–62). Hoffman testified that he observed respondent standing beneath the surveillance camera (Tr. 323–325; see also Tr. 416), and that he focused his attention on respondent for a full two or three minutes, one-third of the time that the robbery was in progress (Tr. 328, 353). Hoffman also gave a description to the F.B.I. (Tr. 329). Hoffman further testified that, prior to trial, he identified respondent from a photographic array and at a police lineup (Tr. 328–331; see also Tr. 420–421). While respondent presented an affirmative defense of alibi, his strongest defense, as the court of appeals noted (App. A, *infra,* p. 6a), was his attempt to discredit the testimony of Van Gemeren and Hoffman.

2. During his cross-examination of Van Gemeren, respondent's counsel asked the witness whether he recalled being interviewed by a Public Defender's office investigator, John Bond (Tr. 77). It soon became apparent that the witness was unsure of whether the particular interview had taken place and, if it had, of the nature of his responses to questions that may have been asked in the course of the interview. The government thereupon requested, and respondent's counsel agreed, that the witness be allowed to

examine his alleged statement for the purpose of refreshing his recollection (Tr. 77–78). However, the statement was not in fact shown to the witness during the overnight recess.

When the trial resumed the following morning, respondent's counsel asked Van Gemeren whether it was not a fact that he had told the defense investigator that he had seen only the back of the robber who had been standing under the surveillance camera; Van Gemeren did not recall (Tr. 90). Government counsel again requested that the witness be allowed to refresh his recollection by reviewing the prior statement that he had allegedly given to the investigator (Tr. 90). Counsel for respondent then stated that he had not allowed Van Gemeren to examine the alleged statement during the overnight recess, as he had previously agreed to do, because he had reconsidered his position on the matter: "I had agreed to that, your Honor, and after saying that yesterday, I talked it over with several other attorneys in our office. It is our position that we do not have to do that because I am only trying to use this interview for impeachment purposes" (Tr. 91). The court ordered counsel to allow the witness to examine the purported statement (Tr. 91–92). Counsel then tore off a strip of paper from his investigator's report, showed it to the court, and had it marked as Defense Exhibit A for identification (Tr. 92–94).[3] After Van

[3] Exhibit A, the purported statement of Van Gemeren, did not contain the witness's name or the date, time, or place of the alleged statement. Moreover, the witness had never read, approved, signed, or adopted any statement.

563-470 O - 74 - 2

Gemeren examined the paper, he testified that it refreshed his recollection but that he still did not recall having told the investigator that he had seen only the back of the robber standing under the surveillance camera (Tr. 99). He further testified, in response to a question from respondent's counsel, that in fact he had not seen only the back of the robber under the camera (Tr. 100).

3. During the cross-examination of prosecution witness Hoffman by respondent's counsel, the following colloquy occurred regarding a telephone conversation that Hoffman had had with the same Public Defender's office investigator, John Bond (Tr. 404):

> RESPONDENT'S COUNSEL: And isn't it a fact that you told Mr. Bond that to you all blacks appear to be alike?
>
> THE WITNESS: I don't believe I indicated that to him.
>
> RESPONDENT'S COUNSEL: You don't recall stating that to Mr. Bond?
>
> THE WITNESS: No, I do not.
>
> RESPONDENT'S COUNSEL: That all blacks look alike?
>
> THE WITNESS: No, I do not, sir.

At the bench, the prosecutor requested respondent's counsel to furnish him with a copy of the memorandum containing Hoffman's purported statements to Bond (Tr. 405–407). Respondent's counsel refused to allow the prosecutor to inspect the memorandum. The judge then indicated that, in the absence of legal authority precluding such inspection, he would require disclosure (Tr. 405);

> It seems only fair, if the government gives you copies of all the statements made. I think that the Government is entitled, in view of the attempt at least of impeachment to see a copy of the statement that this witness made.

The court stated that it would reserve ruling on the government's motion for production until a hearing was held on the matter (Tr. 411). After hearing argument on the motion, the court narrowly defined the issue before it, concluded that Rule 16 of the Federal Rules of Criminal Procedure applied only to pre-trial discovery and was thus inapplicable, and then ruled as follows (Tr. 466, 470–471):

> First of all, the Court is not going to order disclosure of this memorandum at this time. At the present time there has been no impeachment and will be no impeachment until the investigator takes the stand and testifies as to the allegedly impeaching statements.
>
> Therefore, the issue will not arise until the investigator does take the stand. The issue thereafter will be whether or not for utilization for impeachment purposes the government should be entitled to examine the memorandum made by the investigator, presumptively concurrently with his inquiry of the allegedly impeached witness for purposes of furthering the government's cross examination.
>
> * * * * *
>
> [T]he government may not have the memorandum until the witness has taken the stand and has indicated the particular impeaching testimony which was the last part of Mr. Hoff-

man's testimony relative to his inability to distinguish between people of the black race.

And if he does make such a statement, if he [Mr. Bond] make[s] such a statement, then I believe the government is entitled to an examination of the memorandum—not before that time—but after that time, after he has completed his entire testimony.

The issue, of course, may not arise. It is dependent upon whether or not Mr. Bond is called to testify, but that is the Court's view at this time.

* * * * *

I will say this to assist you, Mr. Allis [respondent's counsel], while I think about it. I am sure there are no statements by any of the defendants contained in this particular memorandum, and my order is going only to this particular memorandum. I am not generalizing on any other memorandum or memoranda you may have.

It goes only to this particular memorandum involving the particular witness Hoffman. If you represent to me that there are matters contained therein, such as recitals by the defendants or your defendant, of course, I would view it imperative that you have the opportunity to excise that, perhaps after an in-camera session with the Court, or something of that nature.

I am specifically concerned only with the Hoffman statement of Mr. Bond.

4. As a part of the defense case, counsel for respondent called John Bond as a witness, without first indicating whether he intended to comply with the court's previous ruling regarding production of Bond's

investigative report (Tr. 518–519). When the court requested an offer of proof as to Bond's testimony, respondent's counsel stated that Bond would impeach the testimony of the witnesses Van Gemeren and Hoffman (Tr. 519), but that he would not turn over these witnesses' statements following Bond's direct testimony (Tr. 520). The court reiterated its ruling (Tr. 520–528) and stated that, in the absence of disclosure of the relevant portions of the investigative report, Bond would not be permitted to testify regarding his interviews with Van Gemeren and Hoffman (Tr. 520). Bond then testified, but, pursuant to the court's order, he was not asked to impeach the identification testimony of Hoffman or Van Gemeren.

5. Respondent was convicted. On appeal, respondent contended that the district court's ruling violated his privilege against self-incrimination, denied him the right of cross-examination, and was contrary to the limitations contained in Rule 16 of the Federal Rules of Criminal Procedure.

A divided panel of the court of appeals reversed. The majority found prejudicial error in conditioning impeachment upon disclosure to the prosecutor of portions of the investigative report, even though this discovery would only be used as an aid to cross-examination by the government. The court held that allowing discovery by the government of those portions of Bond's report relating to conversations about which Bond sought to testify during trial would violate respondent's Fifth Amendment privilege against compulsory self-incrimination (App. A, *infra,* pp. 9a–14a).

Moreover, although the disclosure would not take place until after the government's case-in-chief at trial, the majority deemed the required production of the investigator's notes to be a violation of the attorney work-product rule that it found to be embodied in Rule 16 (App. A, *infra,* pp. 15a–18a).

The dissenting judge, proceeding essentially on the premise that "[t]he purpose of a trial is to develop the truth, not suppress it" (App. A, *infra,* p. 22a), concluded that there was no error in requiring a witness called for impeachment purposes to produce the notes which he made on the subject of impeachment and which form the basis of his testimony. Relying in part on this Court's opinion in *Harris* v. *New York,* 401 U.S. 222, he was of the view that the Fifth Amendment's privilege against self-incrimination did not bar the trial court from ordering disclosure (App. A, *infra,* p. 22a). He also concluded that the majority's reliance on Rule 16, which governs pretrial discovery, and on the Jencks Act, 18 U.S.C. 3500, was misplaced (App. A, *infra,* p. 24a).

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the access for impeachment purposes that a prosecutor should have, following the testimony of a defense witness on direct examination, to prior and possibly inconsistent statements made by that witness, particularly when the witness has been called for the purpose of impeaching the testimony of a government

witness who has previously testified. The holding of the court of appeals precluding production of such documents undermines the truth-seeking process of the criminal trial, and does so by means of an unwarranted extension and misapplication of the Fifth Amendment privilege against compulsory self-incrimination. The decision of the court impedes effective cross-examination through impeachment by prior inconsistent statements, dilutes the traditional discretion of the trial judge to rule on evidentiary matters and, at its worst, may foster misstatement, exaggeration or even perjury on the part of defense witnesses, particularly partisan investigators whose use by defense counsel understandably is increasing with the establishment and growth of well-organized public defender agencies.[4]

In its efforts to protect what it viewed as respondent's Fifth Amendment privilege, the majority below lost sight of the fact that the ascertainment of truth is the ultimate objective of a criminal trial and that

[4] This is of particular concern in light of the view, which surprisingly has achieved respectability in some circles, that a defense attorney may call a witness to testify although he knows the witness will commit perjury. See Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions,* 64 Mich. L. Rev. 1469 (1966). A combination of this view on the part of an investigator and defense attorney with the Ninth Circuit's holding that disclosure of prior statements may not be ordered by a trial judge could easily frustrate the search for truth and the ends of justice in a criminal trial.

the existence of an adequate opportunity, through cross-examination, to test the credibility of a witness who takes the stand, whether for the prosecution or the defense, is crucial to the realization of that goal. It overlooked the established principle that the effort to find the truth should give way only in the face of a recognized privilege or some countervailing policy to which the Constitution compels deference or the legislature or rule-makers have accorded priority.

Moreover, the decision of the court is in conflict on many fronts with the philosophy of prior decisions of this Court. See *United States* v. *Nixon,* No. 73–1766, decided July 24, 1974, slip op., pp. 24–25 (the privilege against self-incrimination, like other privileges, is to be construed narrowly because it is in derogation of the search for truth); *Harris* v. *New York,* 401 U.S. 22 (the shield of the Fifth Amendment privilege cannot be perverted into a license to use perjury free from the risk of confrontation with prior inconsistent statements); *McGautha* v. *California,* 402 U.S. 183 (the privilege against self-incrimination is not diminished by a defendant's decision to testify, although that decision may open the door to otherwise inadmissible evidence that may be damaging to his case); *Williams* v. *Florida,* 399 U.S. 78 (even pretrial, the defendant may be precluded from concealing evidence about his alibi defense when its disclosure would enhance the search for truth); *Wardius* v.

Oregon, 412 U.S. 470 (discovery must be a two-way street, and reciprocal disclosure may be required in some contexts because it enhances the search for truth); *Schmerber* v. *California,* 384 U.S. 757 (the compulsory production of certain types of evidence is consistent with the privilege against self-incrimination even though it may be a "vital link" in the chain of evidence against the accused; see also *United States* v. *Dionisio,* 410 U.S. 1; *United States* v. *Mara,* 410 U.S. 19; *California* v. *Byers,* 402 U.S. 424); *Dennis* v. *United States,* 384 U.S. 855 (disclosure rather than suppression of relevant materials promotes the proper administration of criminal justice). It is also at odds with the decisions of the appellate courts of each State that, so far as our research discloses, has considered the issue.[5]

1. The court of appeals held that the order to disclose relevant portions of the defense investigator's report violated the defendant's privilege against compulsory self-incrimination. Quoting from the District of Columbia Circuit's opinion in *United States* v. *Wright,* 489 F. 2d 1181, 1195 (C.A.D.C.), the court embraced the following view (App. A, *infra,* p. 14a):

> The defendant has a right under the Fifth Amendment to compel the state to investigate

[5] *State* v. *Montague,* 55 N.J. 387, 262 A. 2d 398; *People* v. *Sanders,* 110 Ill. App. 2d 85, 249 N.E. 2d 124; *People* v. *Damon,* 24 N.Y. 2d 256, 247 N.E. 2d 651, 299 N.Y.S. 2d 830. The only other federal decision concerning this issue is *United States* v. *Wright,* 489 F. 2d 1181 (C.A.D.C.), in which a divided panel of the District of Columbia Circuit concluded that it was error for the trial court to have ordered disclosure of an investigator's report.

563-470 O - 74 - 3

> its own case, find its own evidence, and prove its own facts. The defense has no duty to help the prosecution convict the defendant. We therefore reject any rule which would require the defense to turn over to the prosecution prior statements of defense witnesses which could be used by the prosecution against the accused.[6]

The court suggested that "[i]f the prosecutor doubted the validity of the contexts in which the purported statements were made as testified to by Bond, he surely had access to his own witnesses and by their testimony could have offered rebuttal to Bond's version" (*ibid.*).

This analysis both misses the point and reflects a misunderstanding of the Fifth Amendment's privilege

[6] The majority's reliance on *Wright* was misplaced, as the dissenting judge in this case made clear (App. A, *infra*, p. 23a; emphasis in original).

> (1) [I]n *Wright* the order was overly broad and required defense counsel to surrender for inspection the entire report, rather than specific portions relevant only to the impeachment question; (2) there, the prosecutor was seeking the statement to use it as substantive evidence, rather than for impeachment purposes; and (3) *Wright* recognizes, as a Hornbook rule of evidence, that had the investigator used parts of his report to refresh his recollection, the prosecution would be entitled to examine those parts of the report relating to impeachment, and would be permitted to make use of them in the cross-examination. The opinion then goes on to emphasize that the investigator *did not* use the report to refresh his recollection. * * * Here, as previously mentioned, I feel that the presence of the statement on counsel table, his use of the statement in interrogating Hoffman and his lengthy colloquy with the court and opposing counsel would clearly indicate that Bond had so refreshed his recollection.

against compulsory self-incrimination. The privilege is "a *personal* privilege: it adheres basically to the person, not to information which may incriminate him." *Couch* v. *United States,* 409 U.S. 322, 328. Moreover, the privilege applies only to a defendant's own testimony or to evidence relating to some communicative act or writing of the defendant himself (*Schmerber* v. *California, supra,* 384 U.S. at 761, 765), and not, as found by the court here, to statements or notes of a defense investigator concerning his interviews with witnesses to the offense who presumably would testify for the government. Finally, it cannot be said in this case that respondent was *compelled* to produce incriminating statements in the Fifth Amendment sense, for he was not forced to produce the tesimony of John Bond; it was his decision to call the investigator in his behalf. See *People* v. *Damon, supra,* 24 N.Y. 2d at 261, 247 N.E. 2d at 654, 299 N.Y.S. 2d at 834. Thus, the court of appeals erred both because the privilege did not apply to the communications at issue and because there was no compulsion to produce those communications. Indeed, none of the values reflected by the privilege against self-incrimination and comprehensively catalogued by the Court in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55, was compromised by the district court's order to disclose relevant portions of the investigator's report. Rather, that order reflected the court's adherence to the admonition of Mr. Justice Holmes, speaking for a unanimous Court in *Matter of Harris,* 221 U.S. 274, 279–280: "The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story."

The court of appeals, we submit, adhered much less well than the district court to the teachings of this Court. First, it failed to distinguish between statements of an accused and those of a witness for the accused, and it ignored the fundamental difference between compelled testimony and that which is volunteered: the statements at issue were not those of respondent but of a witness offered by respondent. Second, it failed to recognize that respondent was not compelled to produce either incriminating statements of his own, substantive evidence against himself, or the smallest link in the evidence necessary to convict himself: disclosure of the investigator's statement would not have been required until long after the government had closed its case-in-chief and had already submitted sufficient evidence to withstand a motion for acquittal. Third, since the choice of whether to call the investigator belonged solely to respondent, any privilege that possibly did exist as to his testimony would have been waived following an election to place the investigator on the witness stand, just as it would have been waived had respondent himself chosen to testify; for "[t]he safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Raffel* v. *United States,* 271 U.S. 494, 499.[7] Finally, if under *Harris* v.

[7] The fact that the trial court conditioned that choice upon disclosure of revelant portions of the investigator's report did not impinge upon the privilege in a constitutionally impermissible manner. Cf. *McGautha* v. *California, supra,* 402 U.S. at 213.

New York, supra, 401 U.S. at 226, respondent would have been unable to use the Fifth Amendment's shield as insulation from his own otherwise inadmissible prior inconsistent statements, there is no conceivable justification for clothing him with protection from prior inconsistent statements made by another whom he chose to call as a witness in his behalf. Cf. *Walder* v. *United States,* 347 U.S. 62, 65.

In *Williams* v. *Florida, supra,* this Court upheld a Florida statute requiring a defendant to give the prosecution prior notice of his intention to raise an alibi defense and, upon the prosecutor's request, to provide a list of alibi witnesses. The defendant's major contention was that "he was 'compelled * * * to be a witness against himself' " because he was forced to give the State information that ultimately proved helpful in convicting him. 399 U.S. at 82. Commenting on this assertion the Court stated (*id.* at 83–84):

> The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or when may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.

Cf. *Wardius* v. *Oregon, supra,* 412 U.S. at 474. Similarly, in *McGautha* v. *California, supra,* the Court

noted that the privilege suffers no diminution by a defendant's decision to testify on his own behalf, even though that testimony "may open the door to otherwise inadmissible evidence which is damaging to his case." 402 U.S. at 213.

In *Harris* v. *New York, supra,* a defendant charged with various narcotics offenses took the stand to testify in his own behalf. The prosecution made no attempt during its case-in-chief to introduce certain statements made by the defendant that were concededly inadmissible under *Miranda* v. *Arizona,* 384 U.S. 436. However, these statements were later used to impeach the defendant in a procedure that this Court subsequently approved (401 U.S. at 225–226):

> Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. * * *
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.

We submit that this case falls within the rationale of *Williams* and *Harris.* If an accused can be compelled to disclose the names and addresses of his alibi witnesses before trial, thus affording the government an opportunity to interview them, and if the accused himself can be cross-examined even on the basis of his own prior statements that were unconstitutionally obtained, it follows, *a fortiori,* that he may be compelled during trial to disclose the statements of witnesses whom he chooses to call and that they may be

cross-examined on the basis of their prior statements thus obtained through the lawful processes of the court. "[T]he Constitution does not protect a defendant from the consequences of a defense he makes, nor does it assure him a right to so defend as to deny the state a chance to check into the truth of his position." *State ex rel. Sikora* v. *District Court,* 154 Mont. 241, 244–245, 462 P. 2d 897, 899. If the adversary system of trial "is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played" (*Williams* v. *Florida, supra,* 399 U.S. at 82), it hardly seems likely that, in the context of the search for truth, it can be viewed as a game in which the cards can be concealed even *after* they have been played. On the contrary, our system of criminal justice recognizes that

> [t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. [*United States* v. *Nixon, supra,* slip op. at 24.]

Extending the Fifth Amendment's protection against self-incrimination to prior statements of defense witnesses can only serve to exclude meaningful evidence and thus to hinder the fair and just operation of the system. Permitting the prosecutor to examine a witness's prior statement, on the other hand,

would serve to enable him better to conduct a meaningful cross-examination based upon available information, rather than one based upon assumption, hypothesis or innuendo. See *State* v. *Montague, supra,* 55 N.J. at 401–402, 262 A. 2d at 405. Moreover, in this case such a procedure would have better enabled the jury to weigh the testimony of Van Gemeren, Hoffman and Bond, and thus to assess all the relevant facts of the case in reaching its verdict; for then the jury would have had before it the "best evidence" available for assessing the credibility of all of the witnesses.[8]

[8] The dissenting judge in this case accurately summarized our view of the panel's decision (App. A, *infra*, p. 22a):

> * * * In these circumstances, the price a defendant must pay for having a witness take the witness stand, and testify contrary to declarations of another witness, is to throw open the entire subject to normal cross-examination and to make his testimony vulnerable where, otherwise, it might have been shielded. Surely, the appellant cannot claim for this witness a right which was not available to himself if he had taken the witness stand under the same circumstances.
>
> Closely in point is *Harris* v. *New York* [*supra*], where the court approved the introduction of a statement on cross-examination which could not have constitutionally been utilized on the direct examination of the defendant. There the court held that the defendant, having voluntarily taken the stand, was under an obligation to speak truthfully and accurately, and that in confronting him with his previous statement, the prosecution was doing no more than utilizing the traditional truth-testing devices of the adversary process. Here, if produced, the memorandum might show that Bond did not include the alleged material forming the basis for the impeaching questions to Hoffman. If that were true, the integrity of Bond's testimony would be severely diminished. The prosecutor, in requesting the production of the statement for cross-examination, was doing "* * * no more than utiliz[ing] the traditional truth-testing devices of the adversary process." 401 U.S. at 225. One of the most common practices employed in the art of cross-examination is to ask for the production of any notes or statements which a witness may have used to refresh his recollection.
>
> The purpose of a trial is to develop the truth, not suppress it. We can assume that appellant' counsel was not playing games and that the memorandum probably made no reference to the impeachment questions propounded to the witness Hoffman. Otherwise, there would be no logical reason for the refusal to produce it.
>
> My conclusions with reference to the questions propounded to Hoffman are equally applicable to the questions propounded to the witness Van Gemeren.

2. In reaching its decision in this case, the court of appeals also examined the district court's production order from the perspective of Rule 16 of the Federal Rules of Criminal Procedure, the Jencks Act (18 U.S.C. 3500), and the work-product rule. The court erroneously concluded (App. A, *infra,* p. 17a; emphasis in original):

> [W]hile Rule 16 is framed in terms of *pretrial* discovery, its inclusion of the Jencks Act leads use to conclude that Rule 16 has relevance to discovery *during* trial. And, specifically, defense may discover, for purposes of impeachment, statements of government witnesses who have testified. *But* no such exception is included within the terms of subsection (c) [of Rule 16, which governs discovery by the government]. We would conclude that the work product of defense is inviolable under these circumstances.

This is an incorrect reading of both the Jencks Act and Rule 16. To begin with, Rule 16 is inapplicable to this case, since it was clearly intended to apply only to pre-trial discovery. See Advisory Committee Note to

Rule 16, Federal Rules of Criminal Procedure, 18 U.S.C. App., pp. 4493–4494; *Giles* v. *Maryland,* 386 U.S. 66, 101 (Fortas, J., concurring); see also Rezneck, *The New Federal Rules of Criminal Procedure,* 54 Geo. L. J. 1276, 1276–1278 (1966). Subsection (b) of that Rule does not provide for pre-trial discovery by defense counsel of statements by government witnesses, and subsection (c) does not authorize pre-trial discovery by the government of defense witnesses' statements. Nor do these subsections authorize or provide for in-trial discovery or use of witnesses' statements for impeachment purposes. Correctly framed, this is an evidentiary question for discretionary determination by the trial judge, who traditionally has been called upon to regulate the scope of cross-examination. *Palermo* v. *United States,* 360 U.S. 343, 361 (Brennan, J., concurring).

It is true that the Jencks Act, 18 U.S.C. 3500, deals in part with in-trial disclosure. However, the congressional intent in enacting that statute was only to *limit* the right of the defense to the production of statements of government witnesses that courts previously could order produced in the exercise of their inherent discretion. Congress clearly "had no thought to invade the traditional discretion of trial judges in evidentiary matters beyond checking the extravagant interpretations" of the *Jencks* case[9] by the lower federal courts. *Palermo* v. *United States, supra,* 360 U.S. at 361 (Brennan, J., concurring). Congress did not consider the production of

[9] *Jencks* v. *United States,* 353 U.S. 657.

defense witness statements in passing the Jencks Act, since, in such cases, "[f]inal decision as to production must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge * * * and subject to the appropriately limited review of appellate courts." *Id.* at 353 (opinion of the Court). As the dissenting judges in this case properly stated: "[W]e are not here concerned with the Jencks Act * * * or with Rule 16 * * *. Our problem centers on a simple common law evidentiary question of whether a witness, who was called for impeachment purposes, must produce the notes he admittedly made on the subject of impeachment" (App. A, *infra,* p. 24a).[10]

[10] Even assuming the court of appeals were correct in stating that "the work product of defense is inviolable" (App. A, *infra,* p. 17a), that doctrine is inapplicable to the case at bar. The work product rule is only intended to protect against inquiry into the mental processes of counsel, including trial strategy, legal opinions or conclusions, and the like; it does not provide protection for written statements of witnesses found in counsel's files that might be useful for purposes of impeachment, corroboration, and truth-finding. See *Hickman* v. *Taylor,* 329 U.S. 495, 510–511; *Saunders* v. *United States,* 316 F. 2d 346, 349–350 (C.A.D.C.). The state appellate courts that have considered this proposition have similarly found the work product rule to be inapplicable in these circumstances. See, *e.g.*, *People* v. *Sanders, supra,* 110 Ill. App. 2d at 89–90, 249 N.E. 2d at 126; *State* v. *Montague, supra,* 55 N.J. at 393, 262 A. 2d at 401.

Rule 612 of the proposed Federal Rules of Evidence (56 F.R.D. 276) as promulgated by this Court, would permit an adverse party to inspect, cross-examine from and introduce portions of a writing used by a witness to refresh his recollection either before or while testifying. The version passed by the House of Representatives on February 6, 1974 (H.R. 5463, 93d Cong., 2d Sess.) requires the trial court to determine in its discretion whether disclosure of a writing used by a witness to refresh his recollection

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
PAUL L. FRIEDMAN,
Assistant to the Solicitor General.
PETER M. SHANNON, JR.,
IVAN MICHAEL SCHAEFFER,
Attorneys.

NOVEMBER 1974.

---

before testifying would serve the interests of justice. The passage of the Rule in either form, however, would not obviate the problem presented by this case. On the one hand, if the court of appeals is correct in its decision, the rule itself may have constitutional infirmities. On the other hand, if we are correct in our view, the ability to get at the truth by the traditional method of cross-examination on the basis of prior inconsistent statements should not turn on whether a particular witness has refreshed his recollection before testifying. The "best evidence" should always be required to be produced, and the inherent power of the district court to authorize discovery by the prosecution commensurate with that permitted the defense under the Jencks Act should not be curtailed.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. TOMMIE LOUIS BROWN, *Defendant-Appellant.*	No. 73-2279
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. VIRGIL DAVID SWAIN, *Defendant-Appellant.*	No. 73-2678
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ROBERT LEE NOBLES, *Defendant-Appellant.*	No. 73-2280

[June 10, 1974]

Appeal from the United States District Court
for the Central District of California

Before: ELY and KILKENNY, Circuit Judges, and
ENRIGHT, District Judge*

ENRIGHT, District Judge:

In late morning on February 6, 1973, four men robbed a Crocker National Bank in Los Angeles. Three men were brought to trial in April, 1973, for the offense: defendants Tommie Louis

---

*The Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

Brown, Robert Lee Nobles, and Virgil David Swain. The fourth man, whose name appeared on the indictment as Jonathan Ray Nobles, was a fugitive at time of trial.

The government's theory was that Brown jumped behind the tellers' windows and moved down the line of cages, collecting money from the cash drawers, while the other three guarded the customers and personnel from various positions. A surveillance camera took pictures of all the participants except the one who stood beneath the camera, allegedly defendant Nobles [hereinafter Nobles].

I *The Brown and Swain Appeals*

The evidence against Brown and Swain was similar and consisted of surveillance photographs, items taken from the apartment they shared, a comparison of photographs, eyewitness identifications, and a statement by Brown.

Defendants Brown and Swain primarily attack the comparison of certain photographs. One group of photographs consisting of enlarged surveillance pictures showing the faces and clothing of the two robbers alleged to be Brown and Swain, were placed on a chart next to a second group of photographs consisting of enlarged police pictures of Brown and Swain as well as FBI photographs of the items of clothing seized from their apartment. An FBI expert in photographic identification, Frederick E. Webb, compared the two groups of photographs and stated that the faces in the police photographs were the same faces as those in the surveillance photographs. He also testified that the clothing in the two groups of photographs was the same, and further, he made a similar analysis of a surveillance photograph of a pistol used in the robbery and a FBI photograph of the handgun seized in the apartment.

When Mr. Webb, in response to the prosecutor's questions, began to state his opinion that Brown and Swain were indeed two of the three pictured on the surveillance film, the district court overruled the defense objection but not without some misgiving:

> I must say in my own personal opinion it comes very, very close to impinging upon the province of the jury . . . . that case [*United States v. Cairns*, 434 F.2d 643 (9th Cir. 1970)] I suggest to you, Mrs. Broady, which seems to authorize this very procedure.

Reporter's Transcript [hereinafter R.T.] 260, lines 5-11. We too are troubled by the proffered testimony.

In *Cairns*, this circuit previously wrote:

> Appellant next contends that over his objection on the ground the testimony would invade the province of the jury, Government's witness, a special agent with the Federal Bureau of Investigation and photographic identification specialist, compared two photographs: a photograph taken by the bank's surveillance camera at the time of the robbery and a police photograph of appellant taken ten days prior to trial. To assist in his identification, he enlarged the head area of the surveillance photograph to the same size as the enlarged head area in the police photograph. The witness then pointed out the similarity in the two photographs in the nose and mouth areas, chin line, hair lines, ear contours and inner folds of the ears, among other things. He then testified that based on all the general characteristics the individual in the surveillance photograph is the individual in the police photograph "or another individual having all of these characteristics as to nose, mouth, chin, and the ear characteristics . . . . "We see no error in the admission of this testimony. While the jury is the sole judge of the facts, expert testimony has long been admissible as an aid to the jury.

434 F.2d at 644.

> That concluding statement is undisputed. But whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952).

Advisory Committee's Note to Proposed Federal Rule of Evidence 702, Court Version, 56 F.R.D. 183, 282 (1972). To permit an expert to testify as to his opinion of parentage based on the resemblance of a child to a reputed father in a paternity suit would be grossly inappropriate by the above standard. But just as surely, fingerprint identification, the comprehensive examination of aerial photographs, and other similar scientific and technical evaluations, are obviously within the realm of permissible expert testimony. Testimony as to whether a particular individual is portrayed in a photograph rests on some middle ground. Since the Cairns decision relied solely upon traditional expertise fields, we feel it incumbent upon ourselves to reexamine the issue faced in *Cairns*.

We have requested and reviewed the briefs submitted in *Cairns*. Such review allows us to conclude that the two cases—*Cairns* and the instant one—are distinguishable.

In the instant case, Webb's testimony was general. In reference to the photographs of Brown, he stated broad conclusions: "rather thin-faced," "somewhat elongated," "[t]he mustache is similar, the shape of the nose, the eyes, the eyebrows, ..." R.T. 260, lines 22-24. In *Cairns*, however, the testimony was of greater detail. Not only did the agent compare general contours and shapes but also found ear and lobe formations particularly significant and termed a particular facial crease as "distinctive" and "unusual." Government's Brief, *United States v. Cairns*, p. 5. In its argument to this court in *Cairns*, the government also emphasized the detail of the agent's testimony, for example, his comparison of a nipple in the center of the defendant's ear. *Id.* at 6.

We would hold that *Cairns* should be limited to the precision as argued in its briefs; therefore, when a party seeks to introduce expert testimony on personal photographic identification—whether to prove *or* disprove similarity, he should first be required to make an offer of proof to the court outside the presence of the jury.

After the elicitation of what facts the expert has depended upon in reaching his conclusions, the court should determine whether it has been convinced by a preponderance that the facts offered are beyond the jury's common experience. Of course, the

court in reaching its determination must take into consideration that the party desiring admission may be free to argue his position without the benefit of expert testimony. If the court in its discretion, which may not be disturbed absent clear abuse, is convinced that the expert may materially assist the jury beyond their common experience as amplified by argument of counsel, the expert should be allowed to testify.

The same general test should be applied to the photographic identification and comparison of inanimate objects. The trial courts, however, should be cognizant that while the everyday experiences of twelve laymen over their combined lifetimes may permit them to make photographic comparisons of persons, they may utterly lack experience to distinguish or recognize certain objects such as firearms. In the facts of this particular case, we would hold the admission of the expert's opinion on the personal identification of Brown and Swain to have been error,[1] but his testimony concerning the items seized to have been properly admitted. We cannot conclude, however, that the error was prejudicial. Disregarding the agent's opinion as to their identity, the evidence against Brown and Swain—the eyewitness testimony, the discovery of the items—was overhelming, rendering the error harmless.

---

[1]The photographs introduced in this case afford a spectrum for aiding a trial court in determining when expert testimony may be permitted. There can be no reasonable doubt that the pictures of the robber who moved from cage to cage was indeed defendant Brown. The resolution of the camera is clear; his likeness unmistakable. Testimony of an expert would be of no useful purpose and hence error, but presumably, harmless.

The pictures of the man who stood to the rear of the bank are of poor resolution and quality. The only articulable characteristics concerning which the expert could testify were generalities, *e.g.*, facial contours, shape of sideburns. This foundation would be inadequate, and expert testimony would be error, perhaps prejudicial, depending upon the state of other evidence.

The third pictured individual was the fugitive, allegedly Jonathan Nobles, brother of defendant Nobles. The resolution of the surveillance pictures is clear, but the conclusion that the individual is Jonathan Nobles after comparison with a known photograph of Jonathan Nobles is not entirely free of doubt. An expert, in our opinion, could be useful. Of course, the discretion would lie with the trial court.

II *Nobles Appeal*

The evidence against Nobles differs from the case against Brown and Swain. Most obvious is the absence of surveillance photographs, for Nobles is alleged to have been the robber who stood underneath the camera rather than within its scope. Second, no objects were found to connect him to the offense in contrast to the items seized at the apartment of Brown and Swain. Finally, the eyewitness testimony was far less impressive against Nobles than against Brown and Swain.

A bookkeeper at the bank identified Brown and Swain in court as well as the items of clothing. He could not identify Nobles. Similarly, the assistant branch manager identified Brown and Swain in court but could not identify Nobles.

A bank teller, Peter van Gemeren, identified Brown in court. He did identify Nobles but his testimony was subjected to extensive cross-examination. Likewise, Gary Hoffman, a salesman visiting the bank, pointed out the men alleged to be Brown and Swain on the surveillance photographs and described their activities; he too identified Nobles as having stood by the business counter. Defense also subjected Hoffman to arduous cross-examination.

Although Nobles presented an affirmative alibi defense, his strongest attack was to discredit the key evidence against him: the eyewitness identification by Van Gemeren and Hoffman. To do so, his counsel not only employed cross-examination but also attempted to introduce expert opinion testimony on the frailties of eyewitness examination in general and to impeach the specific eyewitnesses by statements made by them to his investigator.

A. *Expertise on Eyewitness Identification*

Nobles offered the testimony of Dr. Robert Buckhout as an expert witness to describe the problems of eyewitness identification in general and the specific difficulties with the identifications in this case. The court refused the proffered testimony, concluding that the testimony would invade the province of the jury, that the undue consumption of time would substantially outweigh its probative value, and that the offer of proof was inadequate. We in turn cannot conclude that the trial court was in error. *United States v. Amaral,* 488 F.2d 1148 (9th Cir. 1973).

B. *Impeachment*

During the defense case, counsel sought to introduce the testimony of John Bond, chief investigator for the Federal Public Defenders. Mr. Bond had interviewed the witnesses Van Gemeren and Hoffman. On cross-examination Van Gemeren had testified that he did not recall telling Bond that he had seen only the back of the bank robber beneath the camera; Hoffman, during cross-examination, had denied telling Bond that all blacks look alike. Defense counsel's offer of proof was that Mr. Bond would testify that Hoffman had told him that "all blacks look alike" and that Van Gemeren had told him that "as far as the man at the surveillance camera is concerned, he [Van Gemeren] only saw the back of that man." Eventually, the court ordered that impeachment of the witnesses by Bond through these statements would be conditioned upon the defense agreeing to render to the government upon completion of the investigator's testimony the alleged statements as contained in the investigator's report. Rather than submit to this condition, defense counsel chose to forego impeachment, preferring to stand upon his client's right against self-incrimination as well as the protection of a work product rule.

For the reasons stated below, we would hold that, despite the very limited and seemingly judicious restriction on the defense, conditioning impeachment with prosecutorial discovery was prejudicial error. Admittedly, the order was narrowly drawn. But to single out any one witness and require as a condition precedent that his previous statement be produced is inappropriate. The defendant must have the essential right to call an impeaching witness; he need not corroborate the credibility of that witness before calling him to the stand, *i.e.*, by producing a prior recorded or transcribed statement. Were it otherwise, we would fear that such requested discovery would become a matter of routine, a result we desire to avoid.

Although defense counsel did not argue that the condition impinged on the attorney-client privilege, we deem it appropriate to comment on the relevance of that privilege.

The proposed Rules of Evidence as tentatively promulgated by the Supreme Court [hereinafter Court version] included Rule

503, Lawyer-Client Privilege. 56 F.R.D. 183, 235-240 (1972). That rule in pertinent part states:

> (a)(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.
>
> (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional services to the client, ... , (2) between his lawyer and the lawyers representative, ...

Id. at 236. In contrast, the tentative draft of H.R. 5463, 93rd Cong., 1st sess., as amended by the Subcommittee on Criminal Justice, House Committee on the Judiciary [hereinafter House version], contains no specific privilege rules. The House version would promulgate only a general rule, Rule 501, which provides that privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience . . . ." U.S.L.W., Supplement, p. 6, July 17, 1973. The rule does, however, further provide that the Supreme Court may prescribe rules pursuant to statutory authority. Thus, the Supreme Court may some day prescribe rules such as Rule 503 of its version, the literal meaning of which may arguably serve to protect a communication as existed between the investigator and counsel for the defense.

But absent any prescribed rules, common law dictates the federal rules of evidence, and the common law does not protect communications from third persons:

> Since the privilege is designed to secure subjective freedom of mind for the client in seeking legal advice . . . , it has no concern with other persons' freedom of mind nor with the attorney's own desire for secrecy in conduct of a client's case. It is therefore not sufficient for the attorney, in invoking the privilege, to state that the information came somehow to him while acting for the client nor that it came from some particular *third person* for the benefit of the client.

8 Wigmore, Evidence (McNaughton rev. 1961), § 2317(2) (emphasis original).

Defense counsel did strongly assert that to condition impeachment in the manner ordered could infringe upon his client's right against self-incrimination. This problem is indeed troubling.

When Federal Rule of Criminal Procedure 16 was amended in 1966, Justices Black and Douglas dissented. Justice Black wrote: "I am reasonably certain, however, that the Court's transmittal does not carry with it a decision that the amended rules are all unconstitutional. . . . And I agree with my Brother DOUGLAS that some of the proposed criminal rules go to the very border line if they do not actually transgress the constitutional right of a defendant not to be compelled to be a witness against himself." 39 F.R.D. 252, 272 (1966). And Justice Douglas stated:

> The extent to which a court may compel the defendant to disclose information or evidence pertaining to his case without infringing the privilege against self-incrimination is a source of current controversy among judges, prosecutors, defense lawyers, and other legal commentators. A distinguished state court has concluded—although not without a strong dissent—that the privilege is not violated by discovery of the names of expert medical witness whose appearance at trial is contemplated by the defense. I mean to imply no views on the point, except to note that a serious constitutional question lurks here.

The prosecution's opportunity to discover evidence in the possession of the defense is somewhat limited in the proposal with which we deal in that it is tied to the exercise by the defense of the right to discover from the prosecution. But *if* discovery, by itself, of information in the possession of the defendant would violate the privilege against self-incrimination, is it any less a violation if conditioned on the defendant's exercise of the opportunity to discover evidence? May benefits be conditioned on the abandonment of constitutional rights? See, *e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 403-406, 83 S.Ct. 1790, 1793-1795, 10 L.Ed.2d 965. To deny a defendant the opportunity to discovery—an opportunity not withheld from defendants who agree to prosecutorial discovery or from whom discovery is not sought—merely because the

> defendant chooses to exercise the constitutional right to refrain from self-incrimination arguably imposes a penalty upon the exercise of that fundamental privilege.

39 F.R.D. at 277 (footnote omitted).

The "distinguished state court" decision, referenced in the omitted footnote, is *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). In *Jones*, the defendant charged with rape requested a continuance of trial, alleging that he had been impotent for a long time, and the continuance was necessary to gather essential medical evidence. The prosecution responded with a motion for discovery of witnesses, reports, and data concerning the alleged impotence. In holding that the prosecutorial discovery was proper, the California Supreme Court concluded that "since the criminal discovery permitted to the defendant is the result not of a constitutional mandate of due process but rather of the desire to promote orderly ascertainment of truth [discovery] should not be a 'one-way' street." G. Lapides, *Cross-Currents in Prosecutorial Discovery: A Defense Counsel's Viewpoint*, 7 U.S.F.L.Rev. 217, 219 (1973), citing *Jones v. Superior Court*, 58 Cal. 2d at 59-60.

More recently, however, the California Supreme Court has virtually limited *Jones* to its facts. In *Prudhomme v. Superior Court*, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970), the court wrote:

> Our decision in *Jones* was based primarily upon our conviction that since discovery is a valuable tool for ascertaining the truth, it should be conducted along a "two-way street" in criminal as well as civil proceedings, to the extent permitted by constitutional principles. We readily acknowledge that *pretrial* disclosure would greatly facilitate the administration of criminal justice by minimizing the element of surprise, avoiding unnecessary delays and continuances, reducing inconvenience to the court, counsel, jurors and witnesses, and permitting more effective *pretrial* preparation. However, certain significant developments in the law since *Jones* was decided in 1962 caution us not to extend its holding beyond its facts without careful consideration of the possible effects which such an extension could have upon the accused's rights

> and privileges, and especially his fundamental right not to be compelled to be a witness against himself.
>
> . . .
>
> We had occasion, in *People v. Schader*, 71 Cal.2d 761, 770 [80 Cal. Rptr. 1, 457 P.2d 841], to analyze the policy which underlies the privilege against self-incrimination and recognized, ". . . with the United States Supreme Court, 'that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against the accused out of his own mouth.' (*Malloy v. Hogan* (1964) 378 U.S. 1, 7-8 . . . .) The People must 'shoulder the entire load' of their burden of proof in their *case in chief*, without assistance either from the defendant's silence or from his compelled testimony. [Citations]." (See also *Murphy v. Waterfront Com. of N.Y. Harbor*, 378 U.S. 52, 55 [12 L.Ed.2d 678, 681-682, 84 S.Ct. 1594].)
>
> . . .
>
> Thus, if we analyze *Jones* in the light of the policy considerations discussed in *Schader*, it is apparent that the principal element in determining whether a particular demand for discovery should be allowed is not simply whether the information sought pertains to an "affirmative defense," or whether defendant intends to introduce or rely upon the evidence at trial, but whether disclosure thereof conceivably might lighten the prosecution's burden of proving its *case in chief*. Although the prosecution should not be completely barred from *pretrial* discovery, defendant must be given the same right as an ordinary witness to show that disclosure of particular information could incriminate him.
>
> An ordinary witness need not actually prove the existence of an incriminatory hazard as that would surrender the very protection which the privilege against self-incrimination was designed to guarantee. Instead, the privilege forbids compelled disclosures which could serve as a "link in a chain" of evidence tending to establish guilt of a criminal offense; in ruling upon a claim of privilege, the trial court must find that it clearly appears from a consideration of all the circum-

stances in the case that an answer to the challenged question cannot possibly have a tendency to incriminate the witness.

Id. at 323, 325, 326, 466 P.2d at ....., 85 Cal. Rptr. at ..... (footnotes and citations omitted; emphasis supplied).

The California Supreme Court is not alone in this respect. In *United States v. Fratello*, 44 F.R.D. 444, 449, 451 (S.D.N.Y. 1968), Judge Pollack concluded:

> If, therefore, the items sought from the defendants are of a class of evidence which would ordinarily be privileged from disclosure under the Fifth Amendment, the defendants ought not be required to disclose them prior to the establishment on trial of the government's *prima facie* case.
>
> . . .
>
> Until appellate guidance appears which indicates that, in the absence of special circumstances, the price sought by the prosecution for *pre-trial* disclosure of its records is not to be treated as an encroachment on the privilege, this Court is not prepared to condition discovery by the defendant under Rule 16(b) on *pre-trial* disclosure of privileged records in the possession or control of the defendant. In this connection it is noted that Courts usually accept the defendant's view of what records may be self-incriminatory.

Citations omitted; emphasis supplied.

Yet, *Prudhomme* and *Fratello* dealt with pretrial prosecutorial discovery as well as the constitutional concerns of conditioning defense discovery upon the possibility of enhancing the government's case in chief. In the instant case, of course, the discovery would have been during trial and useful only in rebuttal. Then, too, both *Prudhomme* and *Fratello* preceded *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), which upheld the constitutionality of a state's notice of alibi statute in the face of fifth amendment assault. We would, nevertheless, conclude that the fifth amendment remains relevant in the instant circumstances.

In *United States v. Wright*, 489 F.2d 1181 (D.C. Cir. 1973), the Circuit for the District of Columbia faced an analogous situation. The appellant's court-appointed counsel had employed an investigator from the Public Defender Service. The investigator interviewed potential witnesses and sent to counsel a report consisting of summaries of the interviews. At trial the court ordered the investigator who had testified in behalf of the defense to turn over a copy of the report to the government. True, the order was to forward the entire report rather than to specific, relevant portions as were ordered here, but potential incrimination exists in both circumstances.

The court concluded that the principle that criminal discovery must inevitably remain basically a one-way street is firmly imbedded in our common law tradition. *Id.* at 1192. As that circuit also noted,

> There has been some attempt in recent years to increase the Government's right to discovery in criminal cases—for example, through statutes requiring the defense to give pretrial notice of the names of witnesses to be called as part of an alibi defense. But as the Supreme Court has emphasized in holding such statutes constitutional under the Fifth Amendment, they only require the defense to turn over to the Government information which the *defense intends to reveal at trial. See* Williams v. Florida, 399 U.S. 78, 85, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970).

Id. at 1194. (Emphasis added). In the instant case, the defense prior to the cross-examination of the government's witnesses surely could not have intended to reveal its own information when the witnesses may have admitted its import during cross-examination. And if the witnesses had admitted that they had made such statements as "all blacks look alike" or "I only saw him from the back" to the investigator, the government would have had the responsibility of resurrecting its witnesses' testimony by eliciting any rehabilitating statements by those same witnesses.[2]

---

[2]Enterprising counsel may arguably assert that the evidence doctrine of completeness, *e.g.*, Cal. Evid. Code § 356 and Proposed Federal Rules of Evidence, Court version 107, House version 106, would require disclosure. But as the comment to § 356 by the Assembly Committee on the Judiciary implies, the doctrine is not a discovery device, but rather, only permits certain relevant evidence to be admitted that would otherwise be inadmissible. The burden is on the adversary to "inquire," that is, cross-examine or rebut.

Since the Proposed Federal Rule may shift that burden, *i.e.*, the adversary may "require" admission of the entirety, it would conceivably

Since the witnesses, for whatever reasons, denied making the initial damaging statement, the defense had no alternative but to present its impeachment evidence, *i.e.*, Bond's testimony.[3] If the prosecutor doubted the validity of the contexts in which the purported statements were made as testified to by Bond, he surely had access to his own witnesses and by their testimony could have offered rebuttal to Bond's version. In summary, then, we agree with the Circuit for the District of Columbia that

> The defendant has a right under the Fifth Amendment to compel the state to investigate its own case, find its own evidence, and prove its own facts. The defense has no duty to help the prosecution convict the defendant. We therefore reject any rule which would require the defense to turn over to the prosecution prior statements of defense witnesses which could be used by the prosecution as evidence against the accused.

Id. at 1195. *See also People v. Bais*, 31 Cal. App. 3d 663 (1st Dist. 1973).

The *Wright* panel also examined that discovery order from the perspective of the Federal Rule of Criminal Procedure 16 and the Jencks Act, 18 U.S.C. § 3500,[4] as we must.

---

be utilized as a discovery tool. But the proposed rule only encompasses writings or recorded statements introduced into evidence, not the testimony of an individual, albeit that his recollection may be memorialized.

[3]That impeachment is the only alternative was not lost to the prosecutor. At the close of trial, he argued:

> Mr. MacIntyre: . . . Mr. Bond never testified in the trial as to anything Mr. Hoffman did or did not say to him.
>
> Mr. Hoffman, you heard his testimony, and I submit to you he denied the questions, said, "No," to the questions that were asked by Mr. Allis. If he testified any differently Mr. Bond would have testified in this courtroom to you as to what the inconsistencies were, and Mr. Bond did not so testify. You heard his testimony.

R.T. at 745, lines 6-14.

[4]The panel in *Wright* gave due consideration to the problem which could arise if a witness refreshed his recollection. (There is nothing in the record to suggest Bond used his reports to refresh his recollection.) That court considered it "hornbook rule of evidence that, had [the investigator] used parts of his report to refresh his recollection while

Before the promulgation of the original rules of criminal procedure, it was doubtful whether criminal discovery was permitted. In 1966, however, Rule 16 was liberalized toward greater discovery.

The pertinent portions of Rule 16 are as follows:

> (b) *Other Books, Papers, Documents, Tangible Objects or Places.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2) [examinations, tests, experiments], *this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government EXCEPT as provided in 18 U.S.C. § 3500.*
>
> (c) *Discovery by the Government.* If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photo-

---

on the witness stand, the prosecution would be entitled to examine those parts of the report and would be permitted to make use of those parts of the report in cross-examining [him]." 489 F.2d at 1188 (emphasis added). As noted by that panel, however, refreshing recollection *prior* to testifying may stand in different posture. *See* McGill v. United States, 270 F.2d 329, 331 (D.C. Cir. 1959); *see also*, Sullivan v. Superior Court, 29 Cal. App. 3d 64, 105 Cal. Rptr. 241 (1st Dist. 1972) [attorney-client privilege applicable when client previously refreshes recollection].

The Court version of Proposed Rule 612 generally permits an adversary to inspect, cross-examine from, and introduce portions of a writing used by a witness to refresh his recollection either *before or while* testifying. The House version has amended this by requiring the court in its discretion to determine that it be necessary in the interest of justice before a writing be divulged that has been used for prior refreshing of recollection.

graph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, *this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.*

Emphasis and capitalization added.

Each subsection contains a work product[5] savings clause, *i.e.*, the italicized portions. But the government's work product is subject to an important exception, the Jencks Act, 18 U.S.C. § 3500, which provides in relevant part:

---

[5]To apply the work product rule to criminal law is not unusual:

> Although the . . . policies supporting protection of an attorney's work product [have been] stated with reference to civil litigation, they are even more strongly applicable in criminal proceedings. There is "an especially strong tendency toward the protection of materials as the 'work product' of an attorney in criminal cases. Thus, in relevant criminal cases (admittedly few), the courts have *consistently* held statements by witnesses . . . to be the 'work product' of an attorney." Annot., 35 A.L.R.3d 424 (1971) (footnotes omitted) (emphasis added). In State v. Montague, 101 N.J. Super. 483, 244 A.2d 699 (1968) the state sought access to the defendant's attorney's notes concerning interviews with prospective witnesses. The court states:
>
> > "[W]e are satisfied that the notes here in question represented the work product of defendant's attorney and, under the doctrine of Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), production should not have been compelled. The fears therein expressed with regard to the inviolability of an attorney's thoughts and the possibility of inefficiency, unfairness and sharp practice are equally applicable to the setting of a criminal case." 244 A.2d at 702.
>
> In re Grand Jury Proceedings, Duffy v. United States, 473 F.2d 840, 846 (8th Cir. 1973).

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

. . .

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Thus, while Rule 16 is framed in terms of *pretrial* discovery, its inclusion of the Jencks Act leads us to conclude that Rule 16 has relevance to discovery *during* trial. And specifically, defense may discover, for purposes of impeachment, statements of government witnesses who have testified. *But* no such exception is included within the terms of subsection (c). We would conclude that the work product of defense is inviolable in these circumstances.[6] *See*

---

[6]We may note that new proposed amendments to the Federal Rules of Criminal Procedure are pending and will be effective August 1, 1974, unless sooner stayed by Congress. It must be noted that the proposed changes include the addition of Rule 12.1, Notice of Alibi, and 12.2, Notice of Defense Based Upon Mental Condition. Also, Rule 16 has

also, United States v. Wright, 489 F.2d 1181, 1189-90 (D.C. Cir. 1973).

Finally, the court may make brief comment upon the alleged misconduct of the prosecutor. A review of the entire transcript permits us to conclude that the prosecutor's conduct does not require reversal. In fact, the record indicates that the trial judge conducted the case most properly, and the defendants received a fair trial.

Affirmed in part, reversed in part, remanded.

---

undergone revision; of particular note is the revised Rule 16(b), Disclosure of Evidence by the Defendant:

(1) Information subject to disclosure.

(A) *Documents and tangible objects.* Upon request of the government, the defendant shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) *Reports of examinations and tests.* Upon request of the government, the defendant shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(C) *Defense witnesses.* Upon request of the government, the defendant shall furnish the government a list of the names and addresses of the witnesses he intends to call in the presentation of the case in chief. When a request for discovery of the names and addresses of witnesses has been made by the government, the defendant shall be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of Rule 15.

It must be emphasized, however, that Rule 16(b)(2), Information not subject to disclosure, retains the inviolability of internal defense documents.

KILKENNY, Concurring and Dissenting:

BROWN AND SWAIN APPEALS

I concur in the affirmances of the Brown and Swain convictions, but not for the reasons stated by the majority. It is my considered judgment that the records on these appeals are free from error.

NOBLES' APPEAL

Turning now to the Nobles' appeal, I find myself in complete disagreement with the conclusions of the majority on the issue of impeachment by the defense witness, Bond.[1] To understand the issue, it is necessary to outline in detail the events leading up to the action of the trial judge.

On direct examination, the government witness Hoffman identified Nobles as the robber standing under the surveillance camera and also identified him from a photo spread and at a police line-up prior to trial. On cross-examination, Nobles' attorney asked Hoffman, "And isn't it a fact that you told Mr. Bond that to you all the blacks appear to be alike?" Hoffman responded, "I don't believe I indicated that to him." Continuing, the attorney inquired, "You do not recall stating that to Mr. Bond?" Hoffman replied, "No, I do not." Nobles' attorney repeated, "That all blacks look alike." Hoffman responded, "No, I do not, sir." At that time, in a bench conversation outside the presence of the jury, the prosecutor requested defense counsel to furnish a copy of "any interview, notes or recorded statements of Mr. Bond—in regard to a phone call.",[2] and noted "I notice he has a copy, and I would like to have a copy of that at this time before I am able to proceed with redirect examination of the witness." Defense counsel objected. The judge indicated sympathy with the government's view and asked defense counsel to furnish authority indicating that the government was not entitled to the memorandum. After defense counsel, for the second time, rejected the demand of the prosecutor to see the document, the judge conducted a hearing and held that the prosecutor was not entitled to see the investigator's memorandum until Bond took the witness stand and impeached Hoffman's testimony in connection with the memorandum.

---

[1] Chief Investigator, Federal Public Defenders Association.

[2] It is conceded that the conversation was by way of phone.

and then only to the extent that any and all statements of any defendant be excised prior to the delivery to the prosecutor.[3]

Later, defense counsel called Bond. The court inquired as to the nature of Bond's testimony. Counsel responded that the witness would testify as to certain photographs and that ". . . he is going to impeach two statements of Mr. Hoffman." The court then inquired of defense counsel whether he would turn over, at the completion of Bond's testimony, the relevant portions of the document to the prosecution. Defense counsel refused. The court thereupon indicated that those portions of the testimony dealing with the impeachment would be excluded.[4] After an extended colloquy in which the judge fully explained that he would only require the defense to permit inspection of those portions of the memorandum which dealt with the impeaching questions propounded to Hoffman, the court offered to expedite the trial by examining the report *in camera* and there excise such portions not relevant to the Hoffman impeachment. Defense counsel again rejected the court's offer with a statement of his position.[5] Defense counsel then proceeded with the examination of Bond as a defense witness, but did not ask him whether or not Hoffman had made the statement during the telephone conversation of April 6, 1973, ". . . that all blacks appear to be alike."

Obviously, the appellant is in no better position than if Bond had been called, testified that Hoffman had made the statements and on cross-examination was asked if he had made any notes at the time of the telephone conversation, responded that he had and then the prosecutor had asked for the production of the notes. If defense counsel, after a direct order from the judge, failed to produce the notes for inspection, the judge, no doubt, would have ordered the testimony stricken and the jury would have been instructed to disregard it. Here, as often happens in a well-tried case, the judge and the attorneys anticipated the problem and defense counsel was saved the embarrassment of having the testimony stricken in the presence of the jury. It may have been a good trial tactic, but I do not believe appellant is entitled to cash in on it.

The record is clear that defense counsel had the Bond statement on his desk and was utilizing it in connection with the cross-examination of Hoffman. If the trial had followed the customary course and Bond had taken the witness stand, without the preliminary discussions and the court's advisory ruling on the production of the statement, Bond, no doubt, would have said that he used the statement to refresh his memory. For that matter, the record of the proceedings necessarily points to this conclusion. Additionally, there was nothing amateurish about defense counsel's performance and it would be doing him a great injustice to

---

[3]"THE COURT: . . . The Court is going to rule as follows: first of all, the government may not have the memorandum until the witness has taken the stand and has indicated the particular impeaching testimony which was the last part of Mr. Hoffman's testimony relative to his inability to distinguish between people of the black race. And if he does make such a statement, if he and Mr. Bond make such a statement, then I believe the government is entitled to an examination of the memorandum—not before that time—but after that time, after he has completed his entire testimony . . . .

• • • • •

"THE COURT: I will say this to assist you, Mr. Allis, while I think about it. I am sure there are no statements of any of the defendants contained in this particular memorandum, and my order is going only to this particular memorandum. I am not generalizing on any other memorandum or memoranda which you may have. It goes only to this particular memorandum involving the particular witness Hoffman. If you represent to me that there are matters contained therein, such as recitals by the defendants or your defendant, of course, I would view it imperative that you have the opportunity to excise that, perhaps after an in-camera session with the Court, or something of that nature." [R.T. 470-471].

[4]"THE COURT: Mr. Allis is an officer of the court, and [if] Mr. Bond is allowed to testify it would be necessary that those portions of Mr. Bond's investigative report which contain the statements of the impeached witness will have to be turned over to the prosecution; nothing else in that report.

"If Mr. Allis indicates to me that he refuses to do that, then I am not going to allow the particular witness to testify in that area. Now, it is entirely up to Mr. Allis as to what portion, if any, of Mr. Bond's testimony he wishes to elicit." [R.T. 520].

[5]"MR. ALLIS: My position at this time, your Honor, Rule 16 is that the other discovery consents in the Federal Court, that the Fourth, Fifth and Ninth Amendments protect the defendant in whose possession the reports are from turning them over for any reason.

"THE COURT: We are not talking about pretrial discovery. This is post testimony discovery. It has been carefully considered by the Court, and I am narrowing my ruling to the very specific area." [R.T. 526].

assume that he did not properly prepare the witness by having him read the memorandum. In these circumstances, the price a defendant must pay for having a witness take the witness stand, and testify contrary to declarations of another witness, is to throw open the entire subject to normal cross-examination and to make his testimony vulnerable where, otherwise, it might have been shielded. Surely, the appellant cannot claim for this witness a right which was not available to himself if he had taken the witness stand under the same circumstances.

Closely in point is *Harris v. New York*, 401 U.S. 222 (1971), where the court approved the introduction of a statement on cross-examination which could not have constitutionally been utilized on the direct examination of the defendant. There the court held that the defendant, having voluntarily taken the stand, was under an obligation to speak truthfully and accurately, and that in confronting him with his previous statement, the prosecution was doing no more than utilizing the traditional truth-testing devices of the adversary process. Here, if produced, the memorandum might show that Bond did not include the alleged material forming the basis for the impeaching questions to Hoffman. If that were true, the integrity of Bond's testimony would be severely diminished. The prosecutor, in requesting the production of the statement for cross-examination, was doing ". . . no more than utiliz[ing] the traditional truth-testing devices of the adversary process." 401 U.S. at 225. One of the most common practices employed in the art of cross-examination is to ask for the production of any notes or statements which a witness may have used to refresh his recollection.

The purpose of a trial is to develop the truth, not suppress it. We can assume that appellant's counsel was not playing games and that the memorandum probably made no reference to the impeachment questions propounded to the witness Hoffman. Otherwise, there would be no logical reason for the refusal to produce it.

My conclusions with reference to the questions propounded to Hoffman are equally applicable to the questions propounded to the witness Van Gemeren.

We are not here confronted with pretrial discovery proceedings, such as those before the court in the California cases cited by

the majority, and *United States v. Fratello*, 44 F.D.R. 444, 449, 451 (S.D. N.Y. 1968), speaking to the same type of procedure. Much more akin to our problem, as recognized by the majority, is *Williams v. Florida*, 399 U.S. 78 (1970), where a state notice of alibi statute was upheld in the face of a Fifth Amendment constitutional challenge.

United States v. Wright, 489 F.2d 1181 (CA DC 1973), is closer to the target, but is distinguishable on at least three important grounds: (1) in *Wright* the order was overly broad and required defense counsel to surrender for inspection the entire report, rather than the specific portions relevant only to the impeaching question; (2) there, the prosecutor was seeking the statement to use it as substantive evidence, rather than for impeachment purposes; and (3) *Wright* recognizes, as a Hornbook rule of evidence, that had the investigator used parts of his report to refresh his recollection, the prosecution would be entitled to examine those parts of the report relating to impeachment, and would be permitted to make use of them in the cross-examination. The opinion then goes on to emphasize that the investigator *did not* use the report to refresh his recollection. In *Wright*, there was evidently nothing in the record to warrant the court in assuming that the statement in the investigative report was used by the witness to refresh his recollection. Here, as previously mentioned, I feel that the presence of the statement on counsel table, his use of the statement in interrogating Hoffman and his lengthy colloquy with the court and opposing counsel would clearly indicate that Bond had so refreshed his recollection.

Rule 612, Proposed Federal Rules of Evidence, as submitted to the Congress by the Supreme Court, permits an adversary to inspect, cross-examine on and offer in evidence portions of a writing used by a witness to refresh his recollection either before or while testifying. The House has proposed an amendment which would require the court, in its discretion, to pass on whether the interests of justice would be served by divulging the contents of the writing. The proposed legislation is in line with the *in camera* inspection here suggested by the trial judge. In any event, it is crystal clear that the decision in *Wright* turns on the overbroadness of the order requiring the production of the report. We quote from page 1189:

"In addition, the rules governing documents used to refresh recollection could in no event justify requiring Reeves to turn over his entire investigative report to the prosecution. As a defense witness Reeves testified only as to two matters—his interview with Richardson on January 19 and his examination of the lighting conditions at the scene of the crime. Assuming they had been used to refresh his recollection at trial, those parts of his investigative report relative to this testimony and of possible use to the Government in cross-examining Reeves with respect to this testimony would have to be turned over to the prosecution."

• • • • •

"Even if Reeves used the report to refresh his recollection, only those parts of the report relating to his testimony on direct need have been turned over to the Government."

Here, the majority concedes that the order was stated with precision and limited to the challenged areas of impeachment.

As repeatedly stated by the trial judge, we are not here concerned with the Jencks Act, 18 U.S.C. § 3500, or with Rule 16, FRCrimP. Our problem centers on a simple common law evidentiary question of whether a witness, who was called for impeachment purposes, must produce the notes he admittedly made on the subject of impeachment.

Finding no error, I would affirm the judgment of the lower court.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 6-20-74—480

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit

No. 73–2279, No. 73–2678, No. 73–2280

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

TOMMIE LOUIS BROWN; VIRGIL DAVID SWAIN; ROBERT LEE NOBLES, DEFENDANTS-APPELLANTS

D.C. No. 12113

APPEALS from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the transcript of record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed in part, reversed in part, remanded.

Filed and entered June 10, 1974.

APPENDIX C

In the United States Court of Appeals for the Ninth Circuit

No. 73–2279, No. 73–2678, No. 73–2280

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

TOMMIE LOUIS BROWN; VIRGIL DAVID SWAIN; ROBERT LEE NOBLES, DEFENDANTS-APPELLANTS

Before ELY and KILKENNY, Circuit Judges, and ENRIGHT, District Judge*

Order—Filed September 23, 1974

Judges Ely and Enright have voted to deny the Petition for Rehearing in the subject cases. Judge Ely votes to reject the suggestion for en banc rehearing, and Judge Enright recommends the rejection of such rehearing. Judge Kilkenny votes to grant panel rehearing and, alternatively, recommends the adoption of the suggestion for en banc rehearing.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

*Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

U. S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
MAR 13 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-634

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED NOVEMBER 22, 1974. CERTIORARI GRANTED JANUARY 20, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-634

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX*

	Page
Relevant docket entries	3
Indictment	7
Excerpts from the trial transcript	8
Defendant's Exhibit G, Supplemental offer of proof, pages 1-7	42
Judgment and Commitment	48
Order Allowing Certiorari	50

---

*A copy of the opinion of the United States Court of Appeals for the Ninth Circuit was filed as Appendix A to the petition for a writ of certiorari (pp. 1a-24a). The judgment of the court of appeals was reproduced as Appendix B to the petition (p. 25a), and the order of the court denying rehearing and rejecting the suggestion for rehearing *en banc* was reproduced as Appendix C (p. 26a).

CRIMINAL DOCKET

UNITED STATES DISTRICT COURT

No. 12113

THE UNITED STATES

vs.

1. TOMMIE LEWIS BROWN
2. VIRGIL DAVID SWAIN
3. JONATHAN RAY NOBLES
4. ROBERT LEE NOBLES

18 USC 2113 (a), (d): Robbery of National Bank; Use of Dangerous Weapon

RELEVANT DOCKET ENTRIES

Date	*Proceedings*
3/ 5/73	Ent ord for flg Indict & for fixg bail at the following for each deft: Bail set as $50,000.00 C/S as to deft Brown. Bail set at $25,000.00 C/S as to deft Swain. Bail set at $75,000.00 C/S as to defts J. R. Nobles & R. L. Nobles & for the issue of B/W as to each deft. Fld Indic & issd B/W as to defts J. R. Nobles & R. L. Nobles. Md JS-2 (LTL-Crim Cal)
3/12/73	Deft Jonathan Ray Nobles is not present is—FUGITIVE. Deft Robert Lee Nobles is not present is—FUGITIVE Fld Designation of Marguerite A. Broady as retained cnsl for deft Brown. Fld Designation of Edward Gritz as retained cnsl for deft Swain. Fld Signed Statement of Deft's Constitutional Rights by each deft pres. Defts are arr & State T/N is as chrgd. Crt ords this case as to all defts assigned to the cal of Judge Malcolm. M. Lucas & conts matter to 1:30 pm this date for all fur procdgs. (VST)
3/20/73	Fld Note of bail hrg purs to 18 USC 3146 bef (MML) at 1:30 on 3/22/73. fb As to deft Robert Lee Nobles.
3/19/73	Ent proc. Deft Robert Lee Nobles pres w/cnsl & is arr. & pleads Not Guilty to the Indict. Trial date set for 4/3/73, 9:30AM. (MML) Fld deft Robert Nobles stmt of Constutl Rights. Fld deft Robert Nobles financial affidavit-EJA23. fb
3/22/73	Ent procs: Hrg deft Nobles mtn for reductn of bail. Deft. pres w/cnsl. Mtn arg to Crt & Mtn denied. (MML) Fld Deft Nobles' Bail reform Act Form #1. an

4/ 4/73	Fld deft Robert Nobles ExParte mtn for the authorization & the issue of an out-of-district subp ord denied 4/4/73 by MML; affid of Nicholas R. Allis.
4/ 9/73	Fld Ex Parte Mot of deft Nobles through DFPD Nicholas R. Allis for the authorization for Expert Services and the issuance of an OUT-OF-DISTRICT Subpoena with Memo of pts & auths & affid of Nicholas R. Allis in suppt w/Order (UNSIGNED). rjf retnble 4/10/73, 9:30 AM bef (MML). rjf
4/10/73	Ent Proc: All defts except deft Jonathan Ray Nobles who is still a fugitive (1st day) pres w/cnsl. Jury is impaneled & swn. Mkd exhs & swore witns. Defts dscvy mtns are denied. Deft Nobles motn for apptmnt of expert is grnted. Cont to 4/11/73 for fur trial. Fld mtn to restrain & enjoin US aty & supversior. Fld jury instr form. (MML) fb
4/11/73	Ent Proc8: Fur J/T (2nd day). All defts pres w/cnsl. Mkd exhs &sw witns. Cont to 4/12/73, 9:30AM. (MML) fb
4/16/73	Fld Mot of GOV'T to exclude testimony of Dr. Robert Buckhout, with pts & auths in suppt. rjf
4/12/73	Ent procs: Fur J/T (3rd day). All defts pres w/cnsl. Mrks exhs & swore Wtnes. Mttr cont to 4/17/73, 9:30 A.M. (MML) Fb
4/17/73	FUR JURY TRIAL (4th day): Defts pres w/cnsl. Mrkd exhbts & sw witns. Cont to 4/18/73 at 9:30 am. (MML) Fld lists of Witns & Exhbts. Fld Deft Nobles offer of profe for testimony of John R. Bond. Fld Deft Nobles opposition to ord compelling deft to previde govt w/notes of witnes interview. (MML) an
4/18/73	FUR JURY TRIAL (5th Day): Defts pres w/cnsl. Mrkd exhbts & sw witns. Closing args hrd. Jury instructed & retires at 2:25 pm to deliberate. Jury retns at 6:05pm & is excused until 4/19/73 at 9:30am. (MML)
4/19/73	FUR JURY TRIAL (6th Day): All defts pres w/cnsl. Jury resumes delib at 9:30 am. At 1:55pm Jury retns w/verdict finding all said defts Guilty as chrgd. Jury is possed & excused. Defts ord to P/O for I&R & matter cont to 5/21/73 at 1:30pm for sent. (MML) Is Issd abstr to P/O. Fld Jury notes 3,4,5. Fld Verdicts. an
3/20/73	Fld B/W as to deft Robert Lee Nobles retnd exec. cd
5/21/73	Ent Procs: Sentence of deft R. L. Nobles. Deft pres w/cnsl. Deft committed to custody of A/G for 25 yrs under 18 USC 4208(a)(2). Deft advsd of right to appeal. (MML) Fld Judgmt Ent 5/23/73. MD JS-3.

6/ 1/73	Fld NOTICE OF APPEAL as to deft Robert Lee Nobles appealing from Final Judgment dated 5/21/73 & flg fee waived as cnsl Nicholas R. Allis, apptd by Court. Fld Motion to proceed in Forma Pauperis and Certificate, Attorney Certification signed by atty Nicholas R. Allis & Designation of Record on Appeal signed by Atty Nicholas R. Allis & AUSA Darrell MacIntyre & Ord (MML) thereon GRANTING appeal in Forma Pauperis as to said deft. Entered 6/1/73. Issd required copies. ag
7/11/73	Fld org. 2 cys and Clerk's file cy of rptr's transcript of proedgs had on Apr. 10, 11, 1973 (vol 1); Apr. 12, 1973 (vol 2); Apr. 17, 18, 19, 1973 (vol 3) Issd and fwd to C/A orig and 3 cys of rec on appeal along with orig 2 cys and Clerk's file cy of rptr's transcript of predgs had on Apr. 10, 11, 1973 (vol 1); Apr. 12, 1973 (vol 2); Apr. 17, 18, 19, 1973 (vol 3) (no exhbts fwd at this time)
6/27/73	Fld cc Judgmt & Comm as to deft Robert Lee Nobles retnd exec at U.S.P., McNeil Isl., Steilacoom, Wash. cd
8/ 7/73	Fwd to C/A cy of rec on appeal along with cy of reptr's transcript of predgs had on Apr 10, 11, 1973; (vol 1); Apr. 12, 1973 (vol 2); Apr. 17, 18, 19, 1973 (vol 3) fld this date.
2/ 6/74	Fwd to C/A Plaintiff's Exhibits 3 through 6 as supplemental rec. cw
8/30/74	Rec'd frm C/A Plaintiff's Exhibits 3 through 6
10/ 4/74	Rec'd fr C/A cc of jdgmt of C/A (defts Brown, Swain and Nobles) reversing in part, affrmg in part and remanding to USDC (gave to Ct Clerk DH — cy to DM)
10/25/74	Rec'd fr C/A cy of ord of C/A denying "mot for reasonable bail, etc. (cy to Ct Clerk DH)

[Filed March 5, 1973, Clerk, U.S. District Court, Central District of California, by Andy Nelson, Deputy]

United States District Court for the Central District of California

September 1972 Grand Jury
No. 12113 CD

UNITED STATES OF AMERICA, PLAINTIFF

v.

TOMMIE LEWIS BROWN, VIRGIL DAVID SWAIN, JONATHAN RAY NOBLES, and ROBERT LEE NOBLES, DEFENDANTS

Indictment—(18 U.S.C. Sec. 2113 (a), (d): Robbery of National Bank; Use of Dangerous Weapon)

The Grand Jury charges:

(18 U.S.C. Sec. 2113(a)(d))

On or about February 6, 1973, in Los Angeles County, within the Central District of California, defendants TOMMIE LEWIS BROWN, VIRGIL DAVID SWAIN, JONATHAN RAY NOBLES and ROBERT LEE NOBLES, by force and violence and by intimidation, knowingly and willfully took from victim tellers Beryl Berman, Peter Van Gemeren, and Elaine Zanders, $4,051.00, belonging to and in the care, custody, control, management and possession of the Crocker National Bank, Pico-Bronson Office, 4117 West Pico Boulevard, Los Angeles, California, a national bank, a member bank of the Federal Reserve System and a bank whose deposits were insured by the Federal Deposit Insurance Corporation.

In committing the offense heretofore charged, defendants TOMMIE LEWIS BROWN, VIRGIL DAVID SWAIN, JONATHAN RAY NOBLES and ROBERT LEE NOBLES assaulted and put in jeopardy

the lives of Beryl Berman, Peter Van Gemeren and Elaine Zanders by the use of dangerous weapons and devices.

A true bill.

SHIRLEY A. REUTER,
Foreman.

William D. Keller,
WILLIAM D. KELLER,
United States Attorney.

I hereby attest and certify on February 21, 1975, that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody. Clerk, U.S. District Court, Central District of California, By (illegible), Deputy.

EXCERPTS FROM THE TRIAL TRANSCRIPT

* * * * *

DIRECT EXAMINATION OF PETER VAN GEMEREN

* * * * *

By Mr. MACINTYRE:

[22] You say you saw two other men at the front of the bank?

A. Yes, I did.

Q. Do you see either of those two men in the courtroom today?

A. One.

Q. Would you point him out.

A. The man all the way at the end, the blue suit.

Mr. MACINTYRE. May the record reflect the witness has identified the defendant Robert Nobles.

The COURT. Yes.

Mr. MACINTYRE. All right.

Q. Would you place a 3 on the government's Exhibit Number 2, a D3, where you saw the defendant Robert Nobles.

A. [Witness complies.]

Q. You have put that D3 right at the entrance [23] of the bank?

A. Yes.

* * * * *

[33] Q. How long would you estimate that the men were in the bank?

A. Five, seven minutes.

Q. Five to seven minutes?

A. Yes.

Q. Okay. Just one moment, sir.

How would you describe the clothing worn by the defendant Robert Nobles as you have identified him as standing under the surveillance camera at the door?

A. It looked similar.

Q. How would you identify his clothing? What if anything did he have on his head?

A. I'm not positive.

* * * * *

CROSS EXAMINATION OF PETER VAN GEMEREN

* * * * *

By Mr. ALLIS:

[38] Q. Do you recall whether the man under the surveillance camera was faced towards you or away from you?

A. I don't recall.

Q. Do you recall whether his side was to you at any time?

A. Yes, I think so.

[39] Q. How long a time would that have been?

A. Half a minute.

Q. Do you recall whether his back was towards you at any time?

A. Yes.

Q. For how long a time was that?

A. Most of the time.

* * * * *

[58] Q. Was it the bank robber under the surveillance camera?

A. Yes.

Q. Then did you state to the FBI that——

Mr. MACINTYRE. Your Honor, objection to this type of questioning. It is improper cross examination.

What counsel is doing is reading from a 302 interview of this witness with the FBI, and it is improper cross examination. He is asking compound questions that go through the whole sheet.

Why not just have the witness read the sheet?

[59] The COURT. You may approach the bench, gentlemen.

* * * * *

The COURT. All right. Let's get to the point.

The objection is overruled.

[65] * * * * *

By Mr. ALLIS:

Q. Is it your testiony that because this interview was many weeks ago, you cannot recall many of the details of your description?

Mr. MACINTYRE. Objection, Your Honor. That is not his testimony. His testimony is that he cannot recall how he described this individual's hair. I think it is improper cross examination to make that statement.

It assumes facts not in evidence.

The COURT. Overruled.

[67] * * * * *

Q. And that that individual was facing the manager and the employees located on the side directly across from the teller line?

Mr. MACINTYRE. Objection, your honor. It is confusing and compound.

This witness has testified as to the fact that he observed this person's face, that he then turned toward the bank manager, he saw him from the side and from the front.

I can't see that that question is anything but argumentative and confusing.

* * * * *

[69] By Mr. ALLIS:

Q. Does this refresh your recollection about what you told the FBI at the interview?

A. Yes, it does.

Q. Did you tell the FBI that you had noticed another——

Mr. MACINTYRE. Objection, your Honor. This is improper cross examination unless this counsel is trying to impeach this witness with testimony inconsistent with his testimony at trial.

There has been no foundation laid for this whatsoever. It is up to this jury to determine the credibility of this witness and his recollection of the events.

If he said something inconsistent from this witness stand with an interview with the FBI, then counsel, of course, has the right to point that out.

But these things which this witness is being badgered with and asked to read are not inconsistent with any testimony given in this trial.

The COURT. Let's simply ask him, Mr. Allis, now that his recollection is refreshed what he then did tell the FBI.

* * * * *

[77] Q. Do you recall on March 26, 1973 being interviewed by a Mr. John Bond?

A. I don't recall.

Q. Do you recall being interviewed by an investigator with the Federal Public Defender's Office?

A. Yes, I think I do.

[78] Q. You think you did, sir?

A. Yes.

Q. Do you recall stating to Mr. Bond what part of the man under their surveillance camera you saw?

A. No, I don't.

Q. Isn't it also a fact that——

Mr. MACINTYRE. Your Honor, I think the witness ought to have the opportunity to refresh his recollection from any document in the possession of the Federal Public Defender's Office, and I think government counsel ought to be furnished a copy of it in prosecuting this case.

The COURT. Mr. Allis, do you have any objection?

Mr. ALLIS. I don't have any objection to refreshing the witness' memory with my interview.

* * * * *

[89] By Mr. ALLIS:

Q. Do you recall ever telling anyone outside this courtroom that the only part of this man you saw was his back?

Mr. MACINTYRE. Objection, your Honor. It is an ambiguous question. Anyone, when or where?

The COURT. Overruled.

The WITNESS. I saw the side of him and his back.

By Mr. ALLIS:

Q. That was not the question.

The COURT. Just a moment. Let's reread the question.

Listen carefully to the question, Mr. VanGemeren.

[Whereupon the record was read as follows: "Q. Do you recall ever telling anyone outside this courtroom that the only part of this man you saw was his back? "]

The WITNESS. No, I do not recall.

[90] By Mr. ALLIS:

Q. Isn't it a fact that on March 26, 1973 you had an interview with Mr. John Bond of the Federal Public Defender's Office?

A. I believe that's true.

Q. And isn't it a fact that you told him the only thing you recalled seeing was the back of the holdup man?

Mr. MACINTYRE. Objection, your Honor; no foundation.

The COURT. Overruled.

You may answer.

The WITNESS. I do not recall.

By Mr. ALLIS:

Q. Do you recall anything you said to Mr. Bond?

Mr. MACINTYRE. Your Honor, that is an ambiguous question. I think the witness ought to be allowed the right to refresh his recollection if there is any written statement that he gave to Mr. Bond, and I think the government ought to be furnished a copy of it.

The COURT. I think we resolved that yesterday, did we not? Mr. Allis had agreed to allow the witness to examine whatever statement he made.

Has that been done, Mr. Ailis?

Mr. ALLIS. No, it has not, your Honor.

The COURT. All right.

[91] Mr. ALLIS. I would like to approach the bench on that matter.

Mr. MACINTYRE. I would like to ask the Court to order counsel to give me a chance to——

The COURT. You may approach the bench.

[The following proceedings were had at the bench, outside the hearing of the jury:]

The COURT. It is my recollection, Mr. Allis, that you had agreed to show the witness this particular statement so that we could proceed. Has that been done?

Mr. ALLIS. I had agreed to that, Your Honor, and after saying that yesterday, I talked it over with several other attorneys in our office.

It is our position that we do not have to do that because I am only trying to use this interview for impeachment purposes.

However, if your Honor wishes me to, I will state my position that I would rather not.

The COURT. I think it appropriate that you should do so, and then he can either agree that he said it or deny that he said it, whatever the allegedly impeaching statements are.

Mr. MACINTYRE. Your Honor, could the Court order him to furnish me a copy of it, too?

[92] Mr. ALLIS: Again, I object to that, your Honor, that it is improper.

The COURT. He is going to be able to look at it eventually on redirect, is he not? Is he not going to be entitled to look at the various statements that the witness either denies or admits to?

Before trial, I agree it would have been improper, and I wouldn't have allowed it, but now he has a right to go into it ultimately just as you do with the Jencks Act statements. I think it is proper that he should have a look as well as the witness.

Mr. ALLIS. I would just like to note my objection, your Honor.

The COURT. All right.

Mr. MACINTYRE. May I have a copy right now?

[The following proceedings were had in *open court* in the presence of the jury:]

Mr. ALLIS. Your Honor, may I have a moment to tear this, because it is amidst other interviews.

The COURT. Very well.

Mr. ALLIS. Thank you.

Mr. MACINTYRE. Your Honor, if there is any excising of statements, I think the Court ought to hear it.

The COURT. Are you representing, Mr. Allis, that there are interviews on the sheet of other witnesses or [93] potential witnesses?

Mr. ALLIS. I am, your Honor, and I would like your Honor to take a look at it to make sure, but I do not feel that it is my duty, and that it would be improper for me to show this to Mr. MacIntyre.

The COURT. Are you representing that you are presenting the entire statement of this witness to this witness?

Mr. ALLIS. Yes, I am, your Honor.

The COURT. All right. You may proceed.

Mr. MACINTYRE. Your Honor——

The COURT. If you wish to approach the bench, you may.

Mr. MACINTYRE. I would like to just—I don't feel like I ought to have to approach the bench. I would just like to hand this to the Clerk of the Court, and have it marked as the Court's exhibit, because it is really unintelligible to me.

I mean it is cut into pieces and there is no name on it or anything. I can't—there is a name of this witness——

The COURT. It will be marked for identification.

Mr. ALLIS. If there is a piece of scotch tape I will gladly scotch tape this under the other, and I believe that that may make it clearer to the United States attorney.

[94] Mr. MACINTYRE. If he presents it I would like it marked as the Court's exhibit.

The COURT. We will mark it as defendent's A for identification.

Mr. MACINTYRE. And I would like also the representation that counsel is in possession of no other written or recorded statement of any interview of this witness.

The COURT. We will take that up subsequently. Let me see the exhibit, and then you can mark it.

[Whereupon the document hereinabove referred to was handed to the Court.]

[Whereupon the Court looks at the document hereinabove referred to.]

The COURT. Very well. Let's proceed.

[Said document was marked Defendant's Exhibit A for identification.]

The COURT. Mr. Allis, do you wish this placed before the witness?

Mr. ALLIS. Yes.

The COURT. Would you place it before the witness, please, Mr. Clerk.

[Said document placed before the witness.]

The COURT. Okay.

* * * * *

[98] By Mr. ALLIS:

Q. Does reading this interview with Mr. Bond refresh your recollection as to whether you told him that the only thing you recalled seeing was the back of the man under their surveillance camera?

Mr. MACINTYRE. Objection, your Honor. It misquotes the evidence and what this witness told Mr. Bond on that occasion.

The COURT. All right. State your objection.

Mr. MACINTYRE. I object to the question as being—There is no foundation for it, first of all. Second of all—Well, that is the main objection. There is no foundation to that question whatsoever.

It is what this witness testifies to in this courtroom that is important, unless he has been impeached by some prior interview, and there is no foundation for any impeachment.

The COURT. Just a moment. The objection is overruled.

[99] Do you have the question in mind, sir, or do you wish it reread?

The WITNESS. Reread, please.

The COURT. Reread the question, please.

[Whereupon the record was read as follows: "Q. Does reading this interview with Mr. Bond refresh your recollection as to whether you told him that the only thing you recalled seeing was the back of the man under their surveillance camera?"]

The WITNESS. Yes, it does.

By Mr. ALLIS:

Q. Did in fact you tell Mr. Bond that the only thing you recalled seeing was the back of the holdup man under the surveillance camera?

A. I don't recall that.

Q. What does the statement refresh your recollection as to?

A. My statement says that I only saw the back of the man.

Q. Does this refresh your recollection as to what you saw on the day of the bank robbery?

A. Yes.

[100] Q. Did in fact you see only the back of the bank robber?

A. No.

Q. Does this refresh your recollection as to what you told Mr. Bond on the day of his interview?

Mr. MACINTYRE. Objection, your Honor. That question has been asked and answered now three times.

The COURT. Yes. Sustained.

* * * * *

[119] [The following proceedings were had at the bench, outside the hearing of the jury:]

* * * * *

Mr. ALLIS. At this time, your Honor, I move in the alternative for a mistrial because of the continual testimony of the United States Attorney. He has repeated a number of times to the jury that there were two positive ID's by this witness or, in the alternative, that your Honor admonish him to keep his objections simple and clear, and not to testify.

* * * * *

[120] The COURT. All right. From now on if there is going to be any objection by other side you will simply state legal ground for the objection, and the Court will either rule or, if you wish to argue the matter, you may approach the bench.

RECROSS EXAMINATION OF PETER VAN GEMEREN

[133] By Mr. ALLIS:

Q. When you spoke with Mr. MacIntyre in his office this morning was there any mention of the name John Bond?

A. No.

Q. Was there any mention of what you could answer in response to my questions?

A. No.

Q. What did you talk about at that interview?

Mr. MACINTYRE. Your Honor, I think it is an unintelligible question. I think the witness testified he has only been interviewed twice, once by me yesterday morning.

He testified earlier in trial that he did not talk with me about the facts of the case this morning, and I think the question is confusing.

Mr. ALLIS. Objection, your Honor. I request that the testimony of Mr. MacIntyre be stricken and my objections previously made at the bench I request again.

[134] The COURT. The motion is denied.

* * * * *

DIRECT EXAMINATION OF GARY HOFFMAN

* * * * *

My Mr. MACINTYRE:

[323] * * * * *

Q. You may resume the stand. Where was the fourth individual, did you say? Where would the fourth individual be?

A. Well, I'm confused on the numbers.

Q. You pointed to the location of three individuals as shown in the surveillance composite. Where would the fourth individual be?

A. The fourth, again, to the diagram?

Q. Yes.

A. The fourth individual was positioned approximately here (indicating), to the——

Q. You are pointing to an area underneath the [324] surveillance camera. Is that the front door of the bank?

A. That is correct.

Q. All right. You may have a seat.

* * * * *

[325] Do you see the individual in this courtroom that you saw at the front of the bank?

A. Yes, sir, I do.

Q. Would you point him out?

A. The gentleman here in the blue suit.

Mr. MACINTYRE. May the record reflect the witness has identified the defendant Robert Nobles.

The COURT. Yes.

[327] * * * * *

Q. Looking at approximately the man you have identified as defendant Robert Nobles, how far approximately were you from him in the bank?

A. I would say approximately, judging in terms of distance, perhaps from me to you.

Mr. MACINTYRE. Let the record reflect that is approximately——

The COURT. Just a moment. I can give you an exact measurement. We have had it measured previously. Twenty-four feet.

Mr. MACINTYRE. All right.

* * * * *

[328] Q. First of all, how long would you estimate that the robbers were in the bank?

A. I would guess that it would be somewhere in the vicinity of five to eight minutes, something of that nature.

Q. During that period of time for what period of time was your attention focused on the man you have identified as Robert Nobles? Approximately.

A. Perhaps two, three minutes, possibly. It's hard to really put it——

Q. About a third of the time the robbery was being committed?

A. Yes.

Mr. ALLIS. Objection, your Honor; leading.

The COURT. Sustained.

By Mr. MACINTYRE:

Q. The man you have identified as defendant Robert Nobles, what if anything did he say?

A. There was one point in the robbery where a female attempted to enter the bank and was grabbed by the defendant, and an attempt was made to physically force her into the bank.

At that time I heard the defendant indicate something to the effect of, "Come on, get in here. Get in here."

* * * * *

[329] Q. You were interviewed by the FBI on March 28, 1973, were you not?

* * * * *

Q. At that interview you were shown a photo [330] spread, were you not?

A. Yes, sir, I was.

* * * * *

CROSS EXAMINATION OF GARY HOFFMAN

* * * * *

By Mr. ALLIS:

[351] * * * * *

Q. What position was the man under the surveillance camera in, what body position did he take during the time that you saw him under the surveillance camera?

A. He would have been generally facing toward the teller area, and then occasionally shifting to his right, in terms of body position.

Q. Could you draw with an arrow the position [352] where he was facing?

A. Well——

Mr. MACINTYRE. On what occasion, your Honor? I think the question is confusing. He said he faced both ways, toward the witness and toward the teller's area.

The COURT. All right. Let's clarify the question, please.

Mr. ALLIS. I don't believe that he did testify that way, your Honor. Again, I object to Mr. MacIntyre testifying.

* * * * *

Q. How much of the time, if you can recall, was he facing the teller area, the first line that you marked?

A. I really can't say. At that time I was really not cognizant of actual time spent. I do know that [353] on many occasions when I looked that way he was observing the other gentlemen in the back of the bank that was behind the tellers' cages.

Q. What was the total time that you shifted your glances to him and saw him?

A. I would say probably about one-third of the time that I was viewing the holdup.

Q. Do you recall him facing the other side of the bank away from the tellers' area at any time?

A. I can't recall that he did, no.

* * * * *

[385] A. I had another occasion to meet with him at the lineup, which was held at the County jail.

Q. When did that occur?

A. I believe it was two days after that, on a Thursday evening, to make it, I guess, the 30th of March.

[402] * * * * *

Q. Isn't it a fact that you told Mr. John Bond of the Federal Public Defender's office that you were not 100 percent sure that that was the man?

Mr. MACINTYRE. Objection, your Honor. There is no foundation for that question as to the fact that he ever talked to John Bond, when he talked to him, and the circumstances of that interview. Just throwing out a bald statement like that is——

The COURT. Sustained.

By Mr. ALLIS:

Q. Do you recall the conversation with Mr. John Bond on April 6, 1973?

A. Was this in a telephone conversation?

Q. Yes, it was.

A. Yes, I do.

Q. During that conversation did he request that he meet with you for an interview?

A. Yes, he did.

Q. Would it be a fair statement to say that [403] you would be on the road and that you agreed to be interviewed by telephone?

A. Yes.

Q. Isn't it a fact, that you told Mr. Bond during that interview that you could not be 100 percent sure that the man in the bank under the surveillance camera was the same man in the lineup?

[404] * * * * *

The WITNESS. I would have to say yes, that is basically the text of what I told Mr. Bond.

By Mr. ALLIS:

Q. And isn't it a fact that you told Mr. Bond that to you all the blacks appear to be alike?

A. I don't believe I indicated that to him.

Q. You do not recall stating that to Mr. Bond?

A. No, I do not.

Q. That all blacks look alike?

A. No, I do not, sir.

Mr. ALLIS. No further questions. I would like to approach the bench, your Honor.

The COURT. You may approach the bench.

[405] [The following proceedings were had at the bench outside the hearing of the jury:]

Mr. MACINTYRE. Your Honor, first I would request the Public Defender furnish me a copy of any interview, notes or recorded statements of Mr. Bond—in regard to a phone call. I notice he has a copy, and I would like to have a copy of that at this time before I am able to proceed with redirect examination of this witness.

The COURT. Mr. Allis?

Mr. ALLIS. I object to that, your Honor. It is not called for under the law.

The COURT. It seems only fair, if the government gives you copies of all the statements made. I think that the government is entitled, in view of the attempt at least of impeachment to see a copy of the statement that this witness made.

Do you have any points and authorities that would indicate that the government is not entitled to at least view the statement of this witness?

Mr. ALLIS. I don't have right here. I am sure that I can find some within a half-hour.

The COURT. All right. I will give you time to submit points and authorities. Otherwise, please give Mr. MacIntyre a copy.

* * * * *

[407] Mr. ALLIS. Yes, your Honor. I would like to move for a mistrial. Mr. MacIntyre's testimony to the jury has prejudiced my client to such an extent that I do not believe [408] the jury can reach a fair decision based on the testimony given in this trial.

[409] * * * * *

The COURT. I am going to deny the motion for a mistrial, but I am going to instruct you, Mr. MacIntyre, in the future if, for example, you feel, taking a specific example given, that investigative procedures were in some way improper—you may ask to approach the bench and you may state it before the bench. Do not in the future make such statements before the jury.

* * * * *

[414] The COURT. Let's assume for the sake of discussion that a witness had stated at some relevant time that insofar as he, the witness, was concerned, all people of the black race looked similar.

Mr. MACINTYRE. All right.

The COURT. Would that not be quite relevant in determining his ability to make specific identification among four people of the black race, in that he had previously stated that they all looked similar or equal, or the same?

Mr. MACINTYRE. If he had, yes.

The COURT. Of course, that is not for the Court to determine. That is for the jury to determine, whether or not he had made such a statement.

It can't be excluded from the jury's consideration based only on the witness's statement that he never said it.

Mr. MacIntyre. You are correct.

The Court. Mr. Allis has a right to introduce what he contends are impeaching statements, if they are generally impeaching, and it is up to the jury to determine the credibility of the respective witnesses, this witness, Mr. Hoffman, and the witness Mr. Bond.

* * * * *

[416] Q. Directing your attention to the time of the robbery in the bank, which was the robber of the four which you could see most clearly?

A. I would have to say would be the one in the front underneath the cameras.

Q. Isn't it a fact that you told John Bond during the interview with him that the man who was standing at the teller's cage directly across from you was the one you could see more clearly and would be able to identify?

[417] * * * * *

"Q. Isn't it a fact that you told John Bond during the interview with him that the man who was standing at the teller's cage directly across from you was the one you could see more clearly and would be able to identify?"]

The Witness. Yes, I believe I said that.

* * * * *

DIRECT EXAMINATION OF JAMES R. WILKINS

[422] By Mr. MacIntyre:

Q. Mr. Wilkins, by whom are you employed?

A. By the Federal Bureau of Investigation.

[423] * * * * *

Q. When, where and under what circumstances did that arrest take place?

A. The arrest occurred on March 15, 1973 at approximately 10:30 P.M. in the evening, at a bottomless-topless bar located at 11151 South Vermont Street in the City of Los Angeles.

Mr. Allis. Your Honor, at this time I request that I be permitted to approach the bench.

* * * * *

Mr. Allis. Your Honor, I move that the testimony concerning bottomless-topless bars be stricken as unduly prejudicial.

* * * * *

[424] Mr. Allis. Your Honor, if I my, it is my position that when a man is arrested and then he is thrown up against a wall and patted down, and then asked what his name is, and [425] he denies it, that before that denial can be used in court against him it must be shown that he was given his Miranda rights.

And, in addition, your Honor, I move that no testimony be——

The Court. You have given a different fact situation than the offer of proof of Mr. MacIntyre. I understand that this officer went in and asked him what his name was——

Mr. MacIntyre. Right.

The Court.—before any arrest occurred. Now, I may have it wrong.

Mr. MacIntyre. That is correct. He told him to come outside. Robert Nobles went outside and said he was not Robert Nobles.

* * * * *

[431] The Court. Ladies and gentlemen, you are admonished that the scene or the locale of this particular episode is of no materiality to this particular case, and you are admonished to ignore it.

* * * * *

A. Myself and another agent, Special Agent Wayne L. Wickizer, W-i-c-k-i-z-e-r, went into the establishment and saw Mr. Nobles sitting at the end of the bar, in a crowd of other people.

Mr. Wickizer and myself approach Mr. Nobles, Mr. Wickizer going to one side of him, and I went to the other side.

I made the statement, "FBI, Robert Nobles, you are under arrest."

Q. What occurred then?

A. At that time I believe he had a glass, a drink in his hand. He looked at me, made no effort to move whatsoever, and at that time Special Agent Wickizer and myself removed Mr. Nobles from the stool and proceeded to take him [432] outside of the establishment.

* * * * *

[433] By Mr. MacIntyre:

Q. After you and Special Agent Wickizer removed the defendant Robert Nobles from the bar, what occurred then?

A. He was immediately taken outside of the establishment and placed up against a wall where Special Agent Wickizer and Special Agent Jerry D. Price, P-r-i-c-e, proceeded to frisk him for any weapons which he might have on him.

At that time he was handcuffed and taken a short distance away from the opening of the establishment.

Q. What if anything did he say in regard to his identity?

A. When I asked him if he were Robert Nobles he denied—He said, "I'm not Nobles."

Q. Then what occurred?

[434] A. I told him that I knew he was Robert Nobles and that he might as well admit his identity. He again denied his identity.

Q. Then what occurred?

A. At this time, through my prior investigation, I knew that Robert Nobles had several tattoos on his forearms.

At this time with the assistance of Special Agent Wickizer we proceeded to roll up the sleeves on his suit, and at this time I observed on his arms the particular tattoos that I knew the subject to have as being Robert Nobles.

When confronted with this, he said, "Okay."

* * * * *

ARGUMENT OUTSIDE THE PRESENCE OF THE JURY REGARDING REQUEST FOR DEFENSE INVESTIGATOR'S MEMORANDUM

[465] The COURT. Gentlemen, if we may, let's shorten the [466] issue. The issue, as the Court views it—First of all, the Court is not going to order disclosure of this memorandum at this time. At the present time there has been no impeachment and will be no impeachment until the investigator takes the stand and testifies as to the allegedly impeaching statements.

Therefore, the issue will not arise until the investigator does take the stand. The issue thereafter will be whether or not for utilization for impeachment purposes the government should be entitled to examine the memorandum made by the investigator, presumptively concurrently with his inquiry of the allegedly impeached witness for purposes of furthering the government's cross examination.

That is how I view the issue. If counsel view it differently, of course, let's discuss the issue before we discuss the resolution of it.

Mr. MACINTYRE. I think that is the issue, your Honor.

The COURT. Mr. Allis, do you view it in any different light than that?

Mr. ALLIS. Your Honor, it is agreeable with me to confine it to that issue. However, the Court did order me previously to produce a statement of the investigator involving an interview by him with a witness, and I assumed that your Honor was talking about the same thing in this situation.

I would like to note my objection to that again.

[467] The COURT. Upon reflection, there has not been any impeachment of this witness, as yet, I am sure you agree, until the actual impeaching witness testifies as to the impeaching statement.

Simply asking him, "Didn't you tell—" so and so something or other, unless he admits it, of course, then there has been no impeachment. Do you agree with that?

Mr. ALLIS. I certainly do.

The COURT. All right. So the Court is not going to order the disclosure of any investigative reports until the investigator has taken the stand, testified in full and related, if he does, the allegedly impeaching statement.

Then the issue will arise as to whether or not the government, in pursuing cross examination, may be afforded an opportunity to examine the prior memorandum made at the time when presumptively the facts were fresher in the investigator's mind.

Now, do you wish to be heard in that regard, Mr. Allis?

Mr. ALLIS. Your Honor, I think I will rest on this memorandum of points and authorities. First, basically, Rule 16(c) does not authorize the discovery of any defense documents.

The COURT. I don't think 16(c) is applicable. We are really talking about post-testimony production, are we not, [468] 16(c) having to do with pretrial discovery.

Mr. ALLIS. As I understand it, your Honor, then Rule 16(c) applies, does apply, on discovery.

There is an exception in 16(c) to the government concerning witnesses, the government providing statements of witnesses. Now, the Jencks Act covers that and provides only for the government to give statements of witnesses after they have been examined on direct.

That act provides for no reciprocal discovery by the defense.

Furthermore, your Honor, as in the last two pages of the memorandum, we feel that our position is that the Fifth Amendment rights of the defendant would be violated because I would be forced to disclose possible material detrimental to him that I have gotten through use of my investigative sources.

Finally, the defendant's Sixth Amendment rights would be affected because his counsel's performance of thorough investigation would be hindered if that investigation had to be conducted in such a manner as to avoid any writing down of material which is detrimental to the defendant.

Lastly, your Honor, Hikeman versus Taylor, which was a civil case, prohibited the discovery of the work of statements of witnesses for one's side on the grounds that they were the work product of the attorney.

[469] We also feel that the investigative material in this case is the work product of the attorney.

The COURT. Isn't that relative to pretrial discovery, Hikeman versus Taylor?

Mr. ALLIS. It did have to do with pretrial discovery, your Honor, but the principle remains the same, because it was based on a constitutional principle, and that constitutional principle in our view is not waived with regard to what time at trial it is put forward.

The COURT. Thank you. Mr. MacIntyre? Before you begin your argument, Mr. MacIntyre, will you recite for the record what you wish this memorandum for and what portions of it you wish.

Mr. MACINTYRE. What I wish the memorandum for?

The COURT. The investigator's memorandum or statement.

Mr. MACINTYRE. All right. I would desire to be able to look at the memorandum so that I can effectively cross-examine a witness who, possibly, could have given or made any inaccurate notes or falsified testimony given from a government witness.

I think in order to effectively do that and to effectively prosecute and fulfill my duties as an Assistant United States Attorney I should be given the right to see any memorandum in the possession of this investigator which might be conrtrary to his testimony on the witness stand.

[470] I will submit the matter to the Court.

The COURT. All right. The Court is going to rule as follows: first of all, the government may not have the memorandum

until the witness has taken the stand and has indicated the particular impeaching testimony which was the last part of Mr. Hoffman's testimony relative to his inability to distinguish between people of the black race.

And if he does make such a statement, if he and Mr. Bond make such a statement, then I believe the government is entitled to an examination of the memorandum—not before that time—but after that time, after he has completed his entire testimony.

The COURT. The issue, of course, may not arise. It is dependent upon whether or not Mr. Bond is called to testify, but that is the Court's view at this time.

Mr. MACINTYRE. Thank you.

Mr. ALLIS. Your Honor, one more comment, and that is that——

The COURT. I will say this to assist you, Mr. Allis, while I think about it. I am sure there are no statements by any of the defendants contained in this particular memorandum, and my order is going only to this particular memorandum. I am not generalizing on any other memorandum or memoranda you may have.

[471] It goes only to this particular memorandum involving the particular witness Hoffman. If you represent to me that there are matters contained therein, such as recitals by the defendants or your defendant, of course, I would view it imperative that you have the opportunity to excise that, perhaps after an in-camera session with the Court, or something of that nature.

I am specifically concerned only with the Hoffman statement of Mr. Bond. Now, I am sorry I interrupted you.

Mr. ALLIS. I would like to reserve anything further until such time at which the citation may arise, if I may.

The COURT. All right.

* * * * *

ARGUMENT OUTSIDE THE PRESENCE OF THE JURY REGARDING GOVERNMENT MOTION TO EXCLUDE TESTIMONY OF DR. ROBERT BUCKHOUT

[472] Los Angeles, California, Tuesday, April 17, 1973, 10:15 a.m.

* * * * *

[475] Dr. Buckhout is a recognized expert in the area and can testify to the generally accepted theory that identification is a decision-making process which involves both factors having to do with the physical situation and factors having to do with the psychological input on the particular observer.

As far as interfering with the jury's function, your Honor, Dr. Buckhout will testify on the stand, if permitted, that he has no intentions of doing this, that it is up to the jury.

* * * * *

[476] Mr. ALLIS. That is correct, your Honor. And he will also testify that there are approximately 16 factors involved in eyewitness identification. He is quite prepared to testify that many of them are not involved in the identifications here, but some which I have specifically mentioned in the offer of proof are involved.

[477] * * * * *

He will describe the experiments that he has done to illustrate that these factors do indeed play a part in eyewitness identification.

* * * * *

Mr. ALLIS. Various experiments have been done with each of these 16 factors. Some of these 16 factors are present here.

For example, stress is one of those 16 factors. Because of the presence of stress in the particular incident involved here, this is going to have an effect on the ability to perceive of the observer in this case, and it is going to affect it so that it is going to be less reliable than it would have been had this factor of stress not been present.

* * * * *

[481] The COURT. It is the Court's view, and the Court has given some considerable thought to this, and has read every case that the Court can find on the subject—and they are relatively sparse. In addition, the Court has read on the recognized experts in this field, Wigmore, et cetera.

It is the Court's view that it does not take an expert to tell a jury that a person, when under stress can make a mistake. I think that is clearly a matter of [482] argument. I think it would be an invasion of the province of the jury if we should allow this type of testimony in these cases.

The ultimate extension, of course, would be that a psychologist would testify in every case where there was some type of stress or excitement, every personal injury case where automobiles came together and testimony resulted thereafter, the Court would have to allow, then, the additional testimony of psychologists.

Certainly, the Court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate the undue consumption of time.

In this case, I can only see that there would be excessive collateral considerations, we would be immersed in a welter of collateral matters.

* * * * *

The Court is going to hold that it is unreasonable to request such testimony, that it is not necessary in this case, that the offer of proof is inadequate, and that such testimony would not be of assistance to the trier of facts, [483] and that they are uniquely, as jurors, able to pool their common experience and to resolve these very specific issues which Dr. Buckhout would seek to testify to.

* * * * *

Considering the costs involved, the considerable collateral matters, in the Court's view it would probably take longer to have this type of testimony and rebuttal testimony than it would take to try the entire case. Even though it might have some minimal probative value, the collateral considerations are such that it should be excluded. That will be the order of the Court, gentlemen, that the testimony of Dr. Robert Buckhout will be excluded.]

* * * * *

ARGUMENT OUTSIDE THE PRESENCE OF THE JURY REGARDING TESTIMONY OF JOHN R. BOND, DEFENSE INVESTIGATOR

[518] * * * * *

Mr. MACINTYRE. Excuse me, your Honor. On Thursday afternoon at 5:00 o'clock the Court ruled that if Mr. Bond took the stand and testified in this trial that defense counsel [519] and Mr. Allis must furnish the government counsel a copy of any investigative report that Mr. Bond has made.

I would like that report in my possession if he is going to take the stand.

The COURT. I think my ruling was that at the completion of his testimony and as to the relevant portions of his testimony that defense counsel would have to submit a copy of that report. And he hasn't completed his testimony. I don't really know what he is going to examine on.

Mr. MACINTYRE. All right. I just don't want to delay the trial. That is all.

The COURT. You are prepared to submit the relevant portions of the report itself, Mr. Allis, at the completion of his testimony?

Mr. ALLIS. No, I am not.

Mr. MACINTYRE. Then I want the——

The COURT. Just a moment.

Mr. MACINTYRE. Your Honor, I don't want to——

The COURT. Wait a minute. Give me an offer of proof, then, as to what Mr. Bond is going to testify to.

Mr. ALLIS. He is going to testify to some photographs that he took at the bank, and he is going to testify as to—He is going to impeach Mr. Van Gemeren, and he is going to impeach two statements of Mr. Hoffman.

The COURT. All right. Are you prepared to turn over [520] to the government at the completion of the testimony whatever alleged statements were made by Mr. Van Gemeren and Mr. Hoffman to Mr. Bond as contained in his report?

Mr. ALLIS. No, I am not.

Mr. MACINTYRE. Then I move to exclude his testimony.

The COURT. All right. The Court is going to exclude his testimony in those areas, if you are not willing to do so.

Mr. ALLIS. I would like to talk to an associate, but my position is the stated one.

Mr. MACINTYRE. Your Honor, I don't want him to play any games with us now. If Mr. Bond is going to testify I want his entire report submitted to the Court for in-camera inspection and for the Court to allow me to see what reports there are.

I don't want anything as to Mr. Bond testifying and then after he has testified Mr. Allis saying, "Well, we are not going to give you his report, Mr. MacIntyre."

This Court has made a ruling, and I would like it complied with.

The COURT. Mr. Allis is an officer of the court, and Mr. Bond is allowed to testify it would be necessary that those portions of Mr. Bond's investigative report which contain the statements of the impeached witness will have to be turned over to the prosecution; nothing else in that report.

[521] If Mr. Allis indicates to me that he refuses to do that, then I am not going to allow the particular witness to testify in that area.

Now, it is entirely up to Mr. Allis as to what portion, if any, of Mr. Bond's testimony he wishes to elicit.

Mr. ALLIS. All right. At this time, your Honor, I would like to submit an offer of proof from Mr. Bond to make——

The COURT. I think you previously have done so. He is going to testify to some photographs that he took and he is going to testify as to statements made to him, which you view as impeaching by two of the witnesses in this matter.

Mr. ALLIS. Yes, your Honor. And if it is permissible with your Honor to make sure I have not left out anything, I would like to get my statement of what he is going to prove so I can review that and tell your Honor if he is going to testify to anything else.

The COURT. If he testifies in any way about impeaching statements made by either of the two witnesses, then it is the Court's view that the government is entitled to look at his report and only those portions of that report which contain the alleged statements, the alleged impeaching statements of the witnesses.

I don't see any necessity—There isn't an objection as to the relevance, Counsel is not objecting to that.

* * * * *

[522] Mr. ALLIS. First of all, there are two reports in my possession or in Mr. Bond's possession. The reports are in the possession of the defendant, and on behalf of them I put forward his Fifth Amendment right to be free of self-incrimination for not turning over any reports.

The COURT. Just a moment. Let's not go past that. In what way is he going to be incriminated by his statement of a precipient witness which is to be utilized for impeachment purposes?

[523] Mr. ALLIS. Because this report—your Honor, I understand, has taken the position, as a matter of principle, that this report may contain items which are favorable to the government's case,

The COURT. I am not asking you to submit the entire report. I am asking only that that portion of the report which contains this statement and the statement only of the witnesses to be impeached be exhibited, and after the testimony to the government, it is simply to determine the credibility of this witness's ability to recall.

If he has something different in his statement from what he testifies to, I think the government is entitled to cross-examine with that knowledge.

Mr. ALLIS. Just so that I can be clear, your Honor, is your Honor saying that I should turn over the statement in the report after my own cross examination or that I should turn over the whole report to you?

The COURT. No. I don't know how I can make it any clearer. You are not obligated to turn over the whole report. I don't think I have ever said that at any time during these proceedings.

It would be the Court's view that you are obligated to turn over and you are going to have to, if necessary, and outside the presence of the jury, cut out the relevant portions containing the statements of the two [524] witnesses, Hoffman and the other fellow. Those are the ones you are speaking of to impeach, and nothing else.

Mr. ALLIS, As far as Van Gemeren's statement, I have already shown Mr. MacIntyre and Van Gemeren the complete statement.

* * * * *

The COURT. Just a moment.

Has Mr. Allis shown you Mr. Bond's investigative report or at least the portion that contains the statement of Van Gemeren?

Mr. MACINTYRE. No.

Mr. ALLIS. I showed both the witness and Mr. MacIntyre in open court the complete statement of Mr. Van Gemeren.

Mr. MACINTYRE. I have had one glance at it.

The COURT. Let's put it this way. Mr. MacIntyre is apparently saying he hasn't seen it. All I am saying is if this witness is going to testify and recite a statement made by Mr. Van

Gemeren or Mr. Hoffman, then the government is entitled to look at that portion and that portion only of the investigative report of Mr. Bond which contains those statements.

[525] Now, are you prepared to conform to the Court's order, Mr. Allis, in that regard?

Mr. ALLIS. Your Honor, I have been previously ordered by Mr. — At this time, your Honor, if it is agreeable with your Honor, I would like to speak to an associate about this.

* * * * *

[526] The COURT. I can, if it would expedite this, examine this report in camera and make a determination. I don't think it is necessary to do so.

We have had the statement of this witness. If you want to furnish it to me prior to his testimony, I could read it while he is testifying, and we can get the matter moving along. Is that satisfactory with you, Mr. Allis?

Mr. ALLIS. My position at this time, your Honor, Rule 16 is that the other discovery consents in the Federal Court, that the Fourth, Fifth and Ninth Amendments protect the defendant in whose possession the reports are from turning them over for any reason.

The COURT. We are not talking about pretrial discovery. This is post testimony discovery. It has been carefully considered by the Court, and I am narrowing my ruling to the very specific area.

If you are not willing to conform to the Court's ruling, Mr. Allis, please so state and the Court will then instruct you not to inquire in the area of these allegedly [527] impeaching statements.

Mr. ALLIS. All right. I am not willing to conform, your Honor.

The COURT. You may proceed with your direct examination in other areas, then.

* * * * *

Mr. ALLIS. If it is permissible with your Honor, I would like to file at this time an offer of proof for testimony of John Bond and opposition to the order compelling that testimony to——

The COURT. Let me see your offer of proof.

[Whereupon Mr. Allis hands a document to the Court.]

[528] The COURT. All right. The Court will accept for filing the offer of proof for testimony of John Bond.

Apparently, then, you are offering the testimony of John Bond only to impeach the one witness Hoffman, I am gathering, by this offer of proof.

Mr. ALLIS. Your Honor, the reason that that offer of proof is made is because I am—Or, in addition, I want to impeach the testimony of Van Gemeren. Now, that is not included in that one, because I have already shown the whole statement——

The COURT. If you want an appellate court to be able to review what you are trying to do, you had better state an offer of proof as to what he is going to do so far as the impeachment of Van Gemeren.

Mr. ALLIS. All right. My offer of proof is that John Bond would testify that Van Gemeren told him that as far as the man at the surveillance camera is concerned, he only saw the back of that man.

The COURT. All right. The Court will also accept the Opposition to Order Compelling Defendant to Provide Government with Defense Memorandum of Witness Interview.

* * * * *

[543] Mr. ALLIS. Your Honor, as an amendment I would like to add this to the offer of proof of the testimony of John Bond, because I see that it was left out of the typed copy. Instead of being in the typed copy, Number B, it should be that he told—May I get my folder to make it absolutely correct?

The COURT. Yes.

Mr. ALLIS. It should be that he—as he recalls, the man who was standing at the teller's cage directly across from him, was the one whom he could see more clearly and would be able to identify. This is what Mr. Bond would testify that Mr. Hoffman told him.

The COURT. You are reading from what? For the record, is that Mr. Bond's report that you are reading from?

Mr. ALLIS. Yes.

Mr. MACINTYRE. Yes.

The COURT. All right.

[544] Mr. MACINTYRE. And I want a copy of the report.

Mr. ALLIS. Your Honor, I would also like to, for the record, make an objection to the procedure. I feel that I should be permitted to ask Mr. Bond the question, and then after he has answered, if there is any motion to strike that, that is when the objection of Mr. MacIntyre should be handled.

I object to being precluded from asking the question of Mr. Bond.

The COURT. I am not precluding you from asking the question. You are only precluded from asking the question by indicating in advance that you are going to refuse to comply with the Court's direction. I see no distinction between not allowing the witness to testify at this time or being required to strike the testimony at a subsequent date.

As a matter of fact, it would appear to me to be much more prejudicial to your client to have to strike this testimony than to have it not introduced. Certainly, you couldn't argue it because it is stricken.

* * * * *

The COURT. For the record, your offer of proof, does it include the fact that Mr. Bond did in this particular case, with these two witnesses, prepare notes during the time he [545] made his interview with these witnesses and then subsequently reduced them to a written report; is that correct, Mr. Allis?

Mr. ALLIS. That is correct. It is not in the offer of proof but that is what he did.

The COURT. And that, of course, is what we have been talking about when we were talking about a portion of the report being turned over to the government after the completion of Mr. Bond's testimony, I assume.

Mr. MACINTYRE. That is right. And he has refused to comply with it.

Mr. ALLIS. As an officer of the court, when your Honor asked me this morning what my intention was, I felt duty bound to tell your Honor what my intention was with regard to Mr. Bond's statement. I still object to not—if your Honor, given that intention, which I feel duty bound to tell your Honor, because your Honor has asked me what my intention is, if your Honor wants me—I don't know how to phrase this.

I felt duty bound to tell you what I was going to do. At the same time, I do object to not being able to ask, to not being permitted to ask him the question, because I believe that is a proper procedure.

The COURT. I have already explained to you my response to that. I would be required to strike the testimony. In the eyes of the law stricken testimony cannot be considered by the jury.

cannot be utilized by them in reaching their [546] determination.

I see absolutely no difference between your asking the question and then, for example, the court prohibiting an answer, or your asking the question, an answer being given, and your failing to comply with the Court's order, in which case the testimony will be stricken.

Mr. ALLIS. Do I understand your Honor is ordering me not to ask the question?

The COURT. No, I am not ordering you not to ask the question. I am allowing you to ask the question so long as you comply with the Court's direction that at the conclusion of this witness's testimony you will turn over that small portion of the report which relates to the two statements.

I have also offered the Court's services to examine this report in camera and to indicate what portions of the report should be excised for deliverance to the government. You have refused that.

Therefore, I have prohibited you from asking the questions in the area concerned.

* * * * *

CROSS EXAMINATION OF SUSAN ARLENE MATHIS

[567] By Mr. MACINTYRE:

Q. How old are you, Miss Mathis?

A. Nineteen.

Q. Whom were you working for on February 6th?

A. Theodore Bell.

Q. And that was as a nude dancer, was it not?

A. Yes, it was.

Mr. ALLIS. Objection, your Honor.

Mr. MACINTYRE. Pardon me.

Q. Were you a nude dancer on February 6th?

Mr. ALLIS. Objection, your Honor.

The COURT. Do you wish to approach the bench, Mr. Allis?

Mr. ALLIS. No, your Honor.

The COURT. The objection is overruled.

[568] By Mr. MACINTYRE:

Q. Were you dancing as a nude dancer on February 6th?

A. Yes.

* * * * *

CLOSING ARGUMENT FOR THE GOVERNMENT

By Mr. MACINTYRE:

[674] * * * * *

bank. It is awful easy—photographs can be confusing, as most of you know, in dealing with them, in taking pictures of your families, or when traveling. You can take a photograph to show about anything you want to.

What really happened, I think what really let the cat out of the bag in this case is that Mr. Bond went to this bank about 9:00 o'clock in the morning when the shadows were down and there was no lighting, and he stood right underneath the doorway where Mr. Nobles was standing, and he had a picture of him taken.

This is picture Number 3. And, of course, you can't even make out what race the person is or anything in this picture. And he wants you ladies and gentlemen to believe that at about ten minutes to nine or ten after nine [675] this is the way Mr. Hoffman got his look at Mr. Nobles.

Mr. ALLIS. Objection, your Honor. There is no testimony and no intent to show anything of the kind.

Mr. MACINTYRE. I will leave that to you to decide whether or not there is, ladies and gentlemen.

The COURT. Counsel can argue whatever inferences they feel are reasonable under the circumstances.

Mr. MACINTYRE. You take these pictures that Mr. Bond is trying to make you believe of what the view looked like, and you compare with the lighting and the surveillance pictures, and I will let you be the judges of who is trying to pull the wool over your eyes.

[676] * * * * *

lobby. The interesting thing about Mr. Hoffman's testimony

* * * * *

He said about one-third of his time was focused on the defendant Robert Nobles, right here, and on this person right here, directly across from him, who is now a fugitive. He said that the one thing that really drew his attention to the defendant Robert Nobles was that a woman came in the bank, and he grabbed this woman. Then she subsequently ran out of the

bank. This is an event which really stuck in his mind, as it would in any one of your minds.

* * * * *

his testimony, naturally, but at the lineup which he attended, which was on February 23rd, that is 16 days after the robbery, [677] at this lineup all of the defendants, the people in the lineup—there was only the defendant Robert Nobles in that particular lineup, all of the——

Mr. ALLIS. Objection, your Honor. There was no lineup in the month of February.

Mr. MACINTYRE. You will recall the date when you——

The COURT. Ladies and gentlemen——

Mr. ALLIS. I strongly object to that. The testimony was the lineup was two days after March 28th.

The COURT. Ladies and gentlemen, your recollection of when this particular lineup occurred will control in this matter.

* * * * *

[679] This is where Mr. Hoffman was standing. This is where the teller Peter Van Gemeren was standing, looking at it. So I submit to you that these photographs are distorted and they are trying to show you ladies and gentlemen something that didn't really occur at the time of the robbery.

In fact, they were taken at 9:00 o'clock in the morning instead of at 11:20, most of them.

[681] * * * * *

You can consider the fact that he denied his identity at the time of his arrest and was hiding out from the FBI also. Thank you.

Mr. ALLIS. Objection, your Honor. There is no testimony about hiding out from the FBI. I strongly object to that.

The COURT. All right. The jury's recollection, as previously indicated, will control in this matter.

* * * * *

REBUTTAL ARGUMENT FOR THE GOVERNMENT

By Mr. MACINTYRE:

[737] * * * * *

You know, ladies and gentlemen, Darrell MacIntyre didn't bring this particular indictment. This indictment was brought by the Grand Jury of the Central District of California, and

you will have a copy with you. Of course, I have a personal interest in this case, that interest being to see that justice is done, and to see that witnesses come in this courtroom and testify under oath as to the truth of what happened.

We can all sit here and jump on Mr. Hoffman, and we can jump on Mr. Van Gemeren all we want to, but we have to ask ourselves one question. What is a good identification witness? That is a difficult question. What is a good soldier? Audie Murphy was just a plain, common man, and yet in the World War he won the Medal of Honor. He didn't want to do what he had to do, but he did it. He probably was an outstanding soldier.

What did Gary Hoffman do in this case? Mr. [738] Hoffman is just a citizen, just a person like any one of you. He was in the bank, and you have the surveillance pictures with you. He looked at Robert Nobles, he came into this courtroom, under oath, in front of Almighty God, and he said, "That's the man that was standing underneath that camera." He has no motive to lie.

When I prepare these cases with the help of the FBI, I don't bring puppets into this courtroom. I don't have any control over their thinking. They are seeing and they are speaking. They testify under oath.

If that wasn't the man that he saw under that camera, he would have said it wasn't. It is just as simple. They are people trying to tell the truth.

If you want to believe that 19-year-old nude dancer who says that she was with Robert Nobles on that date, then you believe her. Then you believe her. She has an interest in this case. She has been sitting in this courtroom all week. Of course she has an interest.

She was shacking up with Robert Nobles at the time. That is as good an interest as there is.

Mr. Hoffman stood right here in this public lobby, and he saw Robert Nobles. I don't care how many investigators come in this courtroom that don't even have good enough eyesight that they can't even look at a photograph from 12 inches and tell you what time it is.

[739] Then he says, "I stood all over that bank, and this is what you can see." Well, my God, he can't even see 12 inches without his glasses, and he doesn't have his glasses on in these pictures.

Mr. ALLIS. Objection, your Honor. He never testified as to what he could or could not see.

The COURT. All right. Let's proceed, Mr. MacIntyre.

Mr. MACINTYRE. You know, ladies and gentlemen, when the shoes gets tight the foot starts to squirm, and we've got some squirming feet over here.

[740] * * * * *

We don't have to bring the wardrobe out of that apartment in here. There is no need to, and that is why we don't do it. We brought the witnesses in here. The uncontradicted testimony is that Robert Nobles was underneath that surveillance camera. The uncontradicted testimony.

* * * * *

You can look at this photo spread, which counsel has so neatly gone through, and ask yourself, what is a fair photo spread? I submit to you this photo spread [741] is very fair to the defendant Robert Nobles.

The FBI can't help it if when they put a picture in there it happens to say, "Pasadena, California Police Department," or some other area. They don't go out and just arrest people to put them in the photo spreads. They try to pick out an individual who has similar facial characteristics, because they are just as interested as any one of you or I am in making sure that the right man is convicted. And that is what they did in this case.

[742] * * * * *

What difference does it make? Mr. Hoffman got a panoramic view of Robert Nobles right there underneath that camera, and I submit to you he would not, under oath, say that that is the man if he wasn't sure in his mind that it was. No question about it.

* * * * *

[744] And you know when they really jump on me, they have really come down the ladder. When you can't talk about the facts and you can't talk about the law, and you have got to jump on some young FBI agent, and that doesn't work, when you have got to go after the prosecutor, you are really hurting in this case, really hurting, and you better believe Mr. Brown, Mr. Swain and Mr. Nobles are hurting from the evidence presented in this trial.

Why didn't we bring everybody in the bank to this courtroom? We don't have to bring everybody in that bank to this courtroom. We brought intelligent, ordinary people; possibly we could have brought ten more. Possibly they would have testified to the same thing. Who knows?

* * * * *

[745] In regard to what Mr. Bond did or did not do in this case, there has been a little attempt in this case to introduce some racial remarks of some nature in regard to Mr. Hoffman's testimony. Mr. Bond never testified in the trial as to anything Mr. Hoffman did or did not say to him.

Mr. Hoffman, you heard his testimony, and I submit to you he denied the questions, said, "No," to the questions that were asked by Mr. Allis. If he testified any differently Mr. Bond would have testified in this courtroom to you as to what the inconsistencies were, and Mr. Bond did not so testify. You heard his testimony.

He went out there at 10 minutes to nine in the morning and is trying to pull the wool over your eyes by telling you that these are the lighting conditions in the bank in these photographs. That is the biggest bunch of baloney I have ever heard in my life. You look at them and you compare these photographs with these surveillance pictures which were taken right on the button at the time this robbery happened. Mr. Swain and Mr. Brown lived together in an apartment.

Ladies and gentlemen, if you run with the hounds you can't complain when you wake up with the fleas.

* * * * *

[747] All the FBI has done in this case, ladies and gentlemen, is to investigate it properly to bring you the people that they felt were necessary witnesses. And they have testified under oath as to the truth in this case. To attack the FBI I think is just spitting in the wind, because these young men have nothing to do but to honestly and intelligently investigate these cases and bring you the witnesses.

The FBI has done their job in this case. We ask you to do your job.

[Case No. 12113–Crim (MML), U.S.A. vs. Tommie Brown, et al., Defendant's Exhibit G, Date April 18, 1973, iden., date ..... evid. Clerk, U.S. District Court, Central District of California.

By ———, ———, *Deputy Clerk.*]

DEFENDANT'S EXHIBIT G, SUPPLEMENTAL OFFER OF PROOF, PAGES 1–7

United States District Court, Central District of California

No. 12113–MML–CD

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROBERT LEE NOBLES, DEFENDANT

SUPPLEMENTAL OFFER OF PROOF

EXPERIMENTAL AND SOCIAL PSYCHOLOGISTS' THEORIES

Doctor Buckhout will testify to the theory of recognition and identification which is a recognized theory among experimental and social psychologists. He will testify that, based on scientific experiments, some of which he has conducted himself, there are a number of objective factors, some of them unconscious, which affect the reliability of eyewitness identification testimony.

The following table, extracted from a paper by Doctor Buckhout, summarizes 16 sources of unreliability in eyewitness testimony, backed up by specific research, most of which is beyond the ken of the average laymen and/or juror.

TABLE I

A. The Original Situation
   1. Insignificance of Events
   2. Shortness of Period of Observation
   3. Less than ideal observation conditions
B. The Observer
   4. Stress
   5. Physical Condition of the Observer
   6. Prior Conditioning and Experience

   7. Personal Biases
   8. Needs and Motives—Seeing what we want to see
   9. Desire to be a Part of History
C. Testing for Identification
   10. Length of Time From Event to Test
   11. Filling in Details Which Weren't There
   12. Unfair Test Construction
   13. Suggestions in the Test Situation
   14. Conformity
   15. Relation to Authority Figures
   16. Passing on a Theory: The Self-Fulfilling Prophecy

BASIS FOR HYPOTHETICAL QUESTIONS

I have related to Doctor Buckhout that one witness (Mr. Van Gemeran) testified that he worked as a teller at the bank in question, that the robbery occurred at about 11:30 a.m., that it lasted from 5–7 minutes, that the witness was working at the fourth teller desk from the door, that he was ordered to back up, that he saw defendant Brown leap over the counter go down to the teller's *line,* jump over the counter again and leave. Defendant Brown was wearing the same glasses he had on in court. Brown reportedly was wearing a hat and coat which are in evidence. The witness testified that defendant Brown was standing two feet away from him at one point, that he noticed Brown for about four minutes, that he noticed Brown "the most," that he noticed one of the other robbers, (not Defendant Robert Nobles) who was standing from 4–10 feet from him for approximately one minute. The witness testified that the third robber, (not defendant Robert Nobles) was standing approximately fifteen feet away, while defendant Nobles was about twenty feet from him under the surveillance cameras. The witness does not recall whether defendant Nobles was wearing a hat or a jacket. He saw defendant Nobles from the back and side. Defendant Nobles' back was to the witness most of the time. The witness saw a side view for one-half minute; he testified that he was excited and afraid and that this was his first robbery of any kind. The first time the witness saw defendant Nobles since the robbery was in Court. Defendant was in the front row with the other defendants, he testified that he knew that the defendant was a defendant, and that he was seated behind the defendant and several sections to the side prior to testifying.

Expert Opinion

Doctor Buckhout is qualified to relate the facts presented in the hypothetical to his training and research background and render his opinion as to whether the ordinary human observer would be an unreliable eyewitness under the circumstances described. Based on the facts presented, Doctor Buckhout will testify that in his opinion, the average human observer would be unreliable. In support of this opinion Doctor Buckhout will testify that the facts described an accumulation of sources of unreliability from Table I including:

Shortness of Period of Observation
Stress
Prior Conditioning and Experience (no experience with events by witness)
Length of time from Event to Test.
Unfair Test Construction
Suggestion in the Test Situation

The accumulation of these factors support his opinion that the testimony described is unreliable. Further, in line with the theory of the eyewitness, the facts suggest that the witness was dividing his attention to several events, which usually results in a reduction of efficiency.

Basis For Second Hypothetical

I have related to Doctor Buckhout the following facts concerning the testimony of witness Gary Hoffman: Mr. Hoffman was a visitor in the bank, he was standing in the platform area with his back to the counter during most of the robbery. The robbery reportedly lasted 5–8 minutes. The witness testified that this was the first robbery he had ever been in, that he was afraid, excited, and breathing more heavily than normal, that he noticed the man behind the teller's counter working, that he saw him jump over the counter to the lobby, and that his eyes followed him out the front door. He reportedly knew one of the robbers was to his right but did not focus on him. The witness testified that the robber passed within four to five feet of him as he was leaving and gave him a full view, that the robber in the front of the bank toward the teller's area was at one

time within a few feet of him. The witness' attention was focused on defendant Nobles for approximately two to three minutes. The witness recalls only that defendant Nobles had dark clothing and dark hat. The witness testified that Defendant Nobles had a medium complexion, was young in facial features, had a Negroid nose—slightly larger than average—Negroid lips, roundish as opposed to a long face. The witness did not recall a mustache, goatee, or heavy five o'clock shadow. The witness cannot recall sideburns. He recalls seeing his hat was pulled low, no circles under the defendant's eyes, that the eyes did not droop, and that he could not see the color in defendant Nobles' eyes. The witness testified that defendant Nobles wore no glasses, had no double chin, was somewhat stocky in build. The witness was shown a photo-spread on March 28, and picked out defendant Nobles saying that in his opinion this could very well be the bandit. The witness picked defendant Nobles out of the line-up two days later, and identified defendant Nobles in court on April 12, 1973. At the time of the photo-spread the witness wanted to be accurate, hoped it would not be a waste of time, and hoped he would be able to pick out the robber. At the time of the robbery he was concerned with the safety of other people in the bank.

Expert Opinion No. 2

Based on the facts presented in the hypothetical, Doctor Buckhout will testify that the facts indicate the presence of the following sources of eyewitness reliability selected from Table I.

Shortness of Period of Observation
Stress
Prior Conditioning and Experience
Personal Biases
Unfair Testing
Suggestions in Test Situation

On the basis of the accumulation of the above factors, Doctor Buckhout will testify that in his opinion, the eyewitness testimony is unreliable.

Doctor Buckhout, as an expert on the *testing* of eyewitness identification, will be shown the photographs used in the photo-

spread on which the identification of defendant Nobles was made. When asked if such a photo-spread is a "fair test," Doctor Buckhout will testify that in his opinion, it is not. He will point out specific deficiencies in the photo-spread including:

1. The photo of the defendant stands out as unique item.
2. Four out of six photos show a person with a civilian sport shirt while defendant's picture and one other do not.
3. Three of the six photos show very dark skinned persons—which logically excludes their consideration by a witness who is looking for a light-skinned black male.
4. Defendant Nobles' picture is one of two photos which show a clean-shaven face. Four other photos show hair—another biasing factor leaning toward the defendant.

The net effect of these errors in the photo-spread is, in Doctor Buckhout's opinion, to render the photo-spread test unfair, since it leads the witness to exclude from consideration 4–5 of the photos of persons other than the defendant. Instead of it being a test of 1 out of 6, it is a far easier test of 1 out of 2. If a witness were influenced by the uniqueness of the defendant Noble's photo, it would not be a test at all.

Doctor Buckhout will be asked his opinion of the *sequence* of test: photo-spread, line-up and incourt identification—an area of expertise clearly beyond that of the average juror and/or layman. Doctor Buckhout will testify that in his opinion, the line-up identification is clearly unreliable because the witness has effectively been coached on the correct answer by having previously picked out a photo of defendant Nobles. Such a lineup is an unfair test in Doctor Buckhout's opinion.

Further, Doctor Buckhout will testify that the same weakness affected the in-court identification. Doctor Buckhout will testify that the in-court identification test was unfair because Mr. Nobles was clearly identifiable as a defendant. In his opinion, in-court identifications are generally unreliable (even though formally necessary) because of prior knowledge and the suggestiveness of the defendant's seating position in court. Doctor Buckhout will also testify that the description given by witness Hoffman that the nose of the robber was "Negroid," indicates that such a witness relies on such sterotype features

in remembering Black people and that this can effect the reliability of the identification. Recent research shows that white people are less reliable in identification of Black people.

Respectfully submitted,

JOHN K. VAN DEKAMP,
Federal Public Defender.

By Nicholas R. Allis,
NICHOLAS R. ALLIS,
Deputy Federal Public Defender.
Attorneys for Defendant,
ROBERT LEE NOBLES.

Dated: April 17, 1973.

[Received June 27, 10:27 a.m. 1973, U.S. Marshal Service, Los Angeles, California]

United States District Court for the Central District of California

No. 12113—Criminal

UNITED STATES OF AMERICA

v.

ROBERT LEE NOBLES

Judgment and Commitment (Rec. 2-68)

On this 21st day of May, 1973 came the attorney for the government and the defendant appeared in person and with his appointed counsel, Nicholas Allis, Deputy Federal Public Defender.

It is adjudged that the defendant upon his plea of Not Guilty and a Verdict of Guilty has been convicted of the Offense of Robbery of a National Bank and use of a Dangerous Weapon, in violation of Title 18 United States Code, section 2113(a)(d) as charged in the Indictment filed the 5th day of March, 1973, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of twenty-five (25) years.

It is adjudged that the defendant shall become eligible for parole under Title 18 United States Code, section 4208(a)(2), at such time as the Board of Parole may determine.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or

other qualified officer and that the copy serve as the commitment of the defendant.

MALCOLM M. LUCAS,
United States District Judge.

Filed: May 21, 1973, Edward M. Kritzman, Clerk, by Duane K. Hostetter, Deputy Clerk.

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full and correct copy of the original on file in my office, and in my legal custody.

EDWARD M. KRITZMAN, *Clerk,*
United States District Court.

By ———, ———,
Deputy Clerk.

Dated June 1, 1973.

[Filed, June 27, 1973, Clerk, U.S. District Court, Central District of California By Deputy.]

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on ———— to ————.
Defendant noted notice of appeal on ————.
Defendant released on ————.
Defendant's appeal determined on ————.
Defendant delivered on June 22, 1973, to USP–McNeil Isl. at Steilacoom, Wash., the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

EVERETT R. LANGFORD,
United States Marshal,
District of Oregon.

By ———, ———,
Deputy.

Dated June 22, 1973.

Supreme Court of the United States

No. 74–634

UNITED STATES, PETITIONER
v.
ROBERT LEE NOBLES

Order Allowing Certiorari. Filed January 20, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

U.S. GOVERNMENT PRINTING OFFICE: 1975

74-634

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

Supreme Court, U. S.
FILED
DEC 26 1974
MICHAEL RODAK, JR., CLERK

NO._____

UNITED STATES OF AMERICA, Petitioner

v.

ROBERT LEE NOBLES, Respondent

The Respondent, ROBERT LEE NOBLES, who is presently incarcerated at the Federal Correctional Institution, Leavenworth, Kansas, by his undersigned counsel, asks leave to file the attached Brief Opposing Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without payment of costs and to proceed in forma pauperis pursuant to Rule 53.

The affidavit of Respondent's counsel in support of this motion is attached hereto.

NICHOLAS R. ALLIS
Deputy Federal Public Defender

BEST COPY AVAILABLE

FPI-Sandstone
8-1-74—100M—1073

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

UNITED STATES OF AMERICA, Petitioner

v.

ROBERT LEE NOBLES, Respondent

AFFIDAVIT

I, Nicholas R. Allis, being first duly sworn according to law, depose and state, in support of Respondent's motion for leave to proceed without being required to prepay costs for fees:

1. I am a Deputy Federal Public Defender for the Central District of California appointed pursuant to the Criminal Justice Act of 1964 to represent the Respondent at trial and on appeal to the United States Court of Appeals for the Ninth Circuit.

2. I am satisfied that his financial obligations and his income are substantially the same as at the time of my initial appointment. Consequently, because of his poverty he is unable to pay the costs of said cause and he is unable to give security for the same.

FPI-Sandstone
5-1-74—100M—1073

3. Petitioner believes that he is entitled to the redress he seeks in said cause.

Nicholas R. Allis

NICHOLAS R. ALLIS
Deputy Federal Public Defender

SUBSCRIBED AND SWORN to before me this DEC 24 1974 day of December, 1974.

Minna Neumaier

Notary Public

OFFICIAL SEAL
MINNA NEUMAIER
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My Commission Expires Apr 5, 1977

FPI-Sandstone
5-1-74—100M—1073

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

UNITED STATES OF AMERICA, Petitioner

v.

ROBERT LEE NOBLES, Respondent

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

JOHN K. VAN DE KAMP
Federal Public Defender

NICHOLAS R. ALLIS
Deputy Federal Public Defender

Rm 707, United States Courthouse
312 N. Spring Street
Los Angeles, California 90012
Telephone: (213) 688-4796

Counsel for Respondent

FPI-Sandstone
5-1-74—100M—1073

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Order Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	6
Reasons for Not Granting the Writ	12
Conclusion	39
Certificate of Service	40
Appendix	
Opinion of the United States Court Of Appeals for the Ninth Circuit	A
Judgment of the Court of Appeals	B
Court of Appeals Suggestion for Rehearing en banc	C

FPI-Sandstone
5-1-74—100M—1073

TABLE OF AUTHORITIES

Cases	Page(s)
Alford v. United States 282 U.S. 687, 691, 692 (1931)	34
Alma Motor Co. v. Timken Detroit Axle Co., et al. 329 U.S. 129, 136 (1946)	14
Ashwander v. Tennessee Valley Authority 297 U.S. 288, 347 (1935)	14
Barr v. Matteo 355 U.S. 171, 172 (1957)	15
Berger v. United States 295 U.S. 78 (1935)	37
Boyd v. United States 116 U.S. 616 (1886)	21, 22, 28
Brady v. Maryland 373 U.S. 83 (1963)	25
Brooks v. Tennessee 406 U.S. 605, 610-11 (1972)	21
Bruton v. United States 391 U.S. 123 (1968)	33
Caldwell v. United States 205 F.2d 879 (D.C. Cir. 1953)	31
Charles River Bridge v. Warren Bridge 11 Pet. 420, 553 (1837)	15
Coplon v. United States 191 F.2d 749 (D.C. Cir. 1951)	31
Garrity v. New Jersey 385 U.S. 493, 500 (1967)	11, 32
Glasser v. United States 315 U.S. 60, 76 (1942)	30

FPI-Sandstone
8-1-74—100M—1073

TABLE OF AUTHORITIES (CONT'D)

Cases	Page(s)
Griffin v. California 380 U.S. 609 (1965)	23
Griffin v. Illinois 351, U.S. 12 (1956)	30
Hickman v. Taylor 329 U.S. 495 (1947)	29, 2
Hoffa v. United States 385 U.S. 293, 304 n.7 (1966)	25, 31
Hoffman v. United States 341 U.S. 479, 486 (1951)	25
Jones v. Superior Court 58 Cal. 2d 56, 60, 22 Cal Rptr 879	26
Kirby v. United States 174 U.S. 47, 55, 56 (1899)	33
Light v. United States 220 U.S. 523, 538 (1911)	14
Malloy v. Hogan 378 U.S. 1 (1964)	23
Miranda v. Arizona 384 U.S. 436, 460 (1966)	26, 28, 38
Murphy v. Waterfront Comm'n of New York Harbor 378 U.S. 52, 55 (1964)	24
Pointer v. Texas 380 U.S. 400, 403 (1965)	33
Powell v. Alabama 287 U.S. 45, 69 (1932)	30
Prudhomme v. Superior Court of Los Angdes County 2 Cal. 3d 320,326, 85 Cal.Rptr 129,137 (1970)	25

FPI-Sandstone
8-1-74—100M—1073

TABLE OF AUTHORITIES (CONT'D)

Cases	Page(s)
Schmeber v. California 384 U.S. 757, 761 (1966)	22
Siler v. Louisville & Nashville R. Co. 213 U.S. 175, 193 (1909)	14
Simmons v. United States 390 U.S. 377, 392 (1968)	23
Slochower v. Board of Education 350 U.S. 551 (1956)	21
Spector Motor Co. v. McLaughlin 323 U.S. 101, 105 (1944)	14
Spevack v. Klein 385 U.S. 511 (1967)	21, 23
United States v. Germany 32 F.R.D. 421 (M.D. Ala. 1963)	30
United States v. Judson 322 F.2d 460 (9thCir. 1963)	22
United States v. Venuto 182 F.2d 519 (3d Cir. 1950)	32
United States v. White 322 U.S. 694 (1944)	22, 24
United States v. Wright 489 F.2d 1181, 1195 (C.A.D.C)	13, 20, 23, 25
Williams v. Florida 399 U.S. 78, 82 (1970)	26
Constitution and statutes:	
United States Constitution,Fifth Amendment	21,22, 23, 24, 25, 26, 27, 28
United States Constitution, Sixth Amendment	28, 29, 30, 31, 32

FPI-Sandstone
5-1-74—100M—1073

TABLE OF AUTHORITIES (CONT'D)

	Page(s)
Supreme Court Rules, Rule 19(1)	12
The Jencks Act, 18 U.S.C. §3500	14, 18, 19, 20
Federal Rules Criminal Procedure	14, 15,16, 17, 18, 19, 20, 26
Proposed Federal Rules of Criminal Procedure	18
Proposed Federal Rules of Evidence	20, 29
Miscellaneous:	
Formal Opinion No. 23, A.B.A. Committee on Professional Ethics	29
A.B.A. Standards, Providing Defense Service §1.5 (Approved Draft, 1968)	30
A.B.A. Standards, The Defense Functions §4.1 (Approved Draft, 1971)	30
Annotation, Development, since Hickman v. Taylor, of attorney's Work Product Doctrine, 35 ALR 3d 412	29
Wright, Federal Practice and Procedure, Vol. I, §251, at 490	5
8 J. Wigmore, Evidence (McNaughton Rev. 1961)	22
Stern, R. and Gressman, E., Supreme Court Practice (4th Ed. 1969)	13
Comment, "'Work Product' in Criminal Discovery" 1966 Wash. U.L.Q. 321 (1966)	17
Note Developments in the Law, Discovery 74 Harv. Law Rev. 941, 1063 (1961)	19
M. Moore, "Criminal Discovery", 18 The Hastings Law Journal, 865, 907 (1968)	24

FPI-Sandstone
5-1-74—100M—1073

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

UNITED STATES OF AMERICA, Petitioner

v.

ROBERT LEE NOBLES, Respondent

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The Respondent, through his counsel, hereby opposes the petition of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-captioned case.

OPINION BELOW

The opinion of the court of Appeals (Appendix A) is reported at 501 F.2d 146.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1974 (Appendix B). On September 23, 1974, the court of appeals denied a petition for rehearing with a suggestion for rehearing en banc (Appendix C). By order of October 12, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including November 22, 1974. The petition was received by respondent's attorney on November 27, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether in a criminal trial, prior to the direct examination of a defense investigator, called by the defense to impeach the testimony of a government witness, the trial court may order the witness not to testify unless he provides the prosecutor portions of his investigative report to defense counsel relating to the subject matter of his testimony.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment:

> No person * * * shall be compelled in any criminal case to be a witness against himself.

Constitution of the United States, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, to have the Assistance of Counsel for his defense.

18 U.S.C. §3500 provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

FPI-Bandstone
8-1-74—100M—1073

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

. . . .

(e) The term "statement", as used in subsections (b),(c) and (d) of this section in relation to any witness called by the United States, means-

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Rule 16 of the Federal Rules of Criminal Procedure provides in pertinent part:

FPI-Sandstone
5-1-74—100M—1073

(b) Other Books, Papers, Documents, Tangible Objects Or Places

... Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. §3500.

(c) Discovery By The Government

If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other

FPI-Sandstone
5-1-74—100M—1073

internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

FPI-Emeryville
8-1-74—100M—1073

STATEMENT OF THE CASE

1. Respondent, Robert Lee Nobles, was convicted in the United States District Court for the Central District of California along with two other men, Tommie Louis Brown and Virgil David Swain, of bank robbery and assault with a dangerous weapon during the commission of the robbery, in violation of 18 U.S.C. §2113(a)(d). [R.T. 788] 1/ On May 21, 1973, Mr. Nobles and the other two men were sentenced to twenty-five years imprisonment pursuant to 18 U.S.C. §4208(a)(2). The United States Court of Appeals for the Ninth Circuit affirmed the convictions of Swain and Brown, but reversed the conviction of Robert Lee Nobles. [hereinafter respondent Mr. Nobles]

2. On February 6, 1973, at about 11:00 a.m. four black males robbed the Crocker National Bank at 4117 West Pico Boulevard in Los Angeles. The fourth man was a fugitive at the time of the trial.

The evidence against Tommie Louis Brown and Virgil David Swain was similar and consisted primarily of surveillance photographs, items taken from the apartment they shared, a comparison of photographs, eye witness identifications, and a statement by Brown. The evidence against Mr. Nobles consisted of an ambiguous statement and the testimony of two eyewitnesses.

Robert Lee Nobles was arrested at a bar by two agents who had their guns drawn. [R.T. 431, 437] He denied that he was Robert Lee Nobles and later stated that he knew the F.B.I. had been looking for him. [R.T. 433, 439]

1/ R.T. refers to Reporter's Transcript of Court Proceedings

The first eye witness to testify was Peter Van Gemeren, a teller stationed at the fourth window. He estimated the men were in the bank from five to severn minutes. [R.T. 33] He noticed all four robbers but paid closest attention to Brown and the robber who did not stand trial. [R.T. 35, 38] Brown was two feet away from him for one to one and a half minutes and from two to fifteen feet from him for three to four minutes.

He identified Robert Nobles as the man standing under the surveillance camera. This man was the furthest away from him, about twenty feet, of any of the four robbers. [R.T. 38] Moreover, a post stood between him and the surveillance camera which he testified was 7 inches wide but which was later shown to be 20 inches by 11 3/4 inches. [R.T. 535]

He didn't remember whether the man under the surveillance camera was faced towards him or away from him, but thought that his side was visible for a "half a minute." [R.T. 38, 39] For "most of the time" the man's back was to him. [R.T. 39] Van Gemeren told the F.B.I. approximately two weeks after the robbery that the man under the surveillance camera was facing towards the bank manager. [R.T. 58, 60, 70] The manager was seated behind the business counter, and thus the robber would have had to be facing away from Van Gemeren.

He could not recall whether the man was wearing a hat or jacket. [R.T. 33-34] He could not recall the exact date of the robbery. [R.T. 43] He could not recall whether it was the F.B.I. or Los Angeles Police Department Officials who interviewed him two weeks after the robbery or on other occasions. [R.T. 42, 70] When asked if he had told the F.B.I. two weeks after the robbery that the man under the surveillance camera had "black hair, worn bushily" and wore a "floppy hat," Van Gemeren turned to the judge and stated,

"Your Honor, that interview was many weeks ago. I cannot recall what I said." [R.T. 64] He couldn't recall on April 11th the fact that on April 10th he testified that he could not recall whether the man was looking toward him or away from him. [R.T. 88] He couldn't recall whether he had told Federal Public Defender Investigator, John Bond that the only part of the man he had seen was his back. [R.T. 89, 90] He also couldn't recall whether the day on which John Bond interviewed him was closer in time to the day of the bank robbery than "today." [R.T. 100] He did not recall telling Mr. Bond and the United States Attorney that when Elaine Zanders fainted, he went to her aid. [R.T. 95]

The first time Van Gemeren saw Nobles after the day of the robbery was over two months later, on the morning of the trial. The prosecutor told him to go into the courtroom and look at the three defendants to see if he could recognize any of them. [R.T. 82-84] Van Gemeren went into the courtroom and sat down in the second or third row. He saw the defendants seated in the first row, ahead of him and to his left. He decided, based on this observation, that Robert Lee Nobles was one of the robbers. [R.T. 82-84]

Gary Hoffman identified Robert Nobles as the man who was standing underneath the surveillance camera. [R.T. 325]

Hoffman was standing with his back against the business counter, 24 feet away from the surveillance camera. [R.T. 318, 327] He said the robbery lasted from 5-8 minutes and he focused on Robert Nobles for 2-3 minutes. [R.T. 328]

However, he also testified that he observed Brown working behind the tellers cages for three or four minutes, then watched him jump the counter at the rear and exit the bank. [R.T. 343, 344] Moreover, he admitted telling John Bond that the one he could see most clearly was the

fourth bank robber who did not stand trial. [R.T. 417] Hoffman said the man under the camera was generally facing toward the teller area, and then occasionally shifting to his right. [R.T. 351] Hoffman testified directly contrary to Van Gemeren when he stated he did not recall the man under the surveillance camera facing "the business counter at any time." [R.T. 353]

Hoffman said that when he met with F.B.I. agent Wilkins seven weeks after the robbery, he hoped that the meeting would not be a waste of time and that he would be able to pick out somebody from the photographs. [R.T. 394] Hoffman told Agent Wilkins, at that time, that he could only give him a general discription. He picked out the photograph of Nobles from a group of six pictures, but was not absolutely sure that Nobles was the man under the surveillance camera. [R.T. 401]

Two days later, on March 30th, he attended a lineup and picked Robert Nobles out of the lineup although he was not 100% sure that he was the man under the surveillance camera. [R.T. 404]

Hoffman testified that the robber who was underneath the surveillance camera was the one he saw most clearly and then admitted that he told John Bond of the Federal Public Defender's Office that "the man who was standing at the teller's cage directly across from [him] was the one [he] could see more clearly and would be able to identify." [R.T. 417] That man was the fourth robber who did not stand trial. However, he denied telling Mr. Bond that all blacks look alike. [R.T. 404]

The defense offered the alibi testimony of respondent's friend, Susan Mathis, who testified that she had been with respondent during the period of time when the robbery occured.

The defense also intended to call as a witness an expert in eyewitness identification but the Court refused to allow him to testify.

3. Prior to trial, John Bond, the Chief Investigator for the Federal Public Defender's Office, had interviewed the two eyewitnesses, Hoffman and Van Gemeren and written reports of those interviews to defense counsel. On cross-examination Hoffman denied telling Bond that all blacks look alike. [R.T. 404] The other witness, Van Gemeren, testified that he did not recall telling Bond that he had seen only the back of the bank robber. [R.T. 88]

Defense counsel's offer of proof was that John Bond would testify that Hoffman told him that "all blacks look alike" [C.T. 85], and that Van Gemeren told him that "as far as the man at the surveillance camera is concerned, he [Van Gemeren] only saw the back of that man." [R.T. 528] The Court ordered that the investigator not testify to these statements unless defense counsel was prepared to turn over to the government at the completion of the investigator's testimony "the alleged statements. . . as contained in . . . [John Bond's] report." [R.T. 519-20]

Defense counsel refused to turn over to the government portions of the investigator's report to him and pursuant to the court order, John Bond did not testify to the prior inconsistent statements. The reports were placed under seal for the Court of Appeals.

4. In reversing the conviction of respondent, the Court of Appeals held that the trial Court's order directing defense counsel to surrender to the government portions of his investigator's report to him constituted prejudicial error. The Court held that the order violated respondent's Fifth Amendment privilege against self-incrimination

and the provisions governing discovery set forth in Rule 16 of the Federal Rules of Criminal Procedure.

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

1. The Supreme Court Should Not Grant The Petition For A Writ Of Certiorari Since There Are No "Special And Important Reasons" For Reviewing The Decision Of The United States Court Of Appeals

Rule 19 (1) of the Supreme Court Rules provides that review on a writ of certiorari "will be granted only where there are special and important reasons therefor", such as,

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Respondent submits there are no "special and important" reasons for reviewing the decision of the United States Court of Appeals for the Ninth Circuit in United States v. Nobles.

The Court of Appeals did not depart "from the accepted and usual course of judicial proceedings," nor did the court

sanction "such a departure by a lower court, as to call for an exercise of this court's power of supervision." On the contrary, the Court of Appeals corrected the trial court's departure from accepted trial procedure when it disapproved of the enforced production of defense investigation reports in the absence of any showing that the investigator had refreshed his recollection with these reports.

There is no conflict between the decision of the Court of Appeals in United States v. Nobles and the decision of any other Court of Appeals. In fact, this decision is patterned after and based on an opinion of the United States Court of Appeals for the District of Columbia in the only other federal decision dealing with the issue. United States v. Wright, 489 F.2d 1181, 1195 (C.A.D.C.).

Nor does the opinion in United States v. Nobles decide "a federal question in a way in conflict with applicable decisions" of the Supreme Court. That such a "conflict must be direct is emphasized by the fact that although old Rule 38 (5) (b) required only a showing that the decision of the Court of Appeals is 'probably' in conflict with applicable Supreme Court decisions, the present Rule 19 (1)(b) omits the word 'probably'." Stern, R. and Gressman, E., Supreme Court Practice, §4.5 (4th Ed. 1969).

Petitioner states that as to that part of the Court of Appeals decision which is based on the Fifth Amendment, ". . . the decision of the court is in conflict on many fronts with the philosophy of the prior decisions of this court. [Petition at 14]. The cases cited by petitioner do not support this thesis. In any event, there is certainly no decision of the

Supreme Court with which the opinion of the Court of Appeals is in direct conflict within the meaning of Rule 19 (1)(b).

Finally, this case does not present an important question of federal law which has not been, but should be, settled by the Supreme Court. The inviolability of defense documents such as the report at issue in this case, is a principle of long-standing, properly reiterated in the opinion of the Court of Appeals.

The government's argument as to why the Supreme Court should grant the petition for a writ of certiorari is premised on the proposition that the case presents an issue under the Fifth Amendment. However, the Court of Appeals based its decision on a non constitutional grounds as an alternative to the Fifth Amendment. In the present case, as was recognized by the Court of Appeals, the statutory scheme consisting of the Federal Rules of Criminal Procedure, the Jencks Act, and the common law applicable to the admissibility of documents clearly prohibit the forced production of the report in question. Therefore, the Supreme Court need not decide the constitutional issue. The practice of the Court has been to refuse to reach a constitutional issue when there is a non-constitutional basis for the decision. Alma Motor Co. v. Timken-Detroit Axle Co., et al, 329 U.S. 129, 136 (1946); Siler v. Louisville & Nashville R. Co., 213 U.S. 175, 193 (1909); Light v. United States, 220 U.S. 523, 538 (1911); Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944); See Brandeis J., concurring in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936). This Court has stated that "the principle of avoiding constitutional questions is one which was conceived out of considerations of sound judicial administration. It is a traditional policy of our courts." Alma Motor Co. v.

Timken Co., supra at 142; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 553 (1837); Barr v. Matteo, 355 U.S. 171, 172 (1957).

2. Rules Governing Discovery Effectively Prohibited Court From Ordering Disclosure Of Portions Of Report

Rule 16 of the Federal Rules of Criminal Procedure[3] strictly and specifically limits prosecution discovery. Subsection 16 (c) which governs prosecution rights to discovery, permits government inspection of defense documents which will be introduced at trial.[4] In this case there was no intention to introduce the investigator's report at trial.

[3] The 1966 revision of the Rules represented a break with the established policy of non-disclosure by the defendant. Before enactment of Rule 16, a practice of non-disclosure on both sides had been customary. United States v. Hughes, 413 F.2d 1244, 1249 (5th Cir. 1969). At the time Rule 16 was first recommended in 1944, it was thought doubtful that the law allowed any discovery in a criminal case. Wright, Federal Practice and Procedure, Vol I, §251, at 490. It was not until 1966, that Rule 16 was amended to give any discovery powers to the prosecution, and even then the government was granted only "a limited right of discovery under certain circumstances." Wright, supra, at 492. Even this minor change was opposed by two members of the Court. Justice Black wrote a vigorous dissent in which he warned, ". . . some of the proposed rules go to the very borderline if they do not actually transgress the constitutional right of a defendant not to be compelled to be a witness against himself." Order of February 28, 1966 Amending Criminal Rules, 383 U.S. 1032 (1966).

[4] The subsection only applies as a reciprocal right for the government when the defense has been granted discovery under the other subsections of Rule 16. Here, there was no finding by the court in connection with the government request, that the defense had been granted discovery rights.

Most significantly, the Rule 16(c) provides in its work product savings clause,[5] that,

> Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

[5] "Although the . . . policies supporting protection of an attorney's work product were stated with reference to civil litigation, they are even more strongly applicable in criminal proceedings. There is "an especially strong tendency toward the protection of materials as the 'work product' of an attorney in criminal cases. Thus, in relevant criminal cases (admittedly few), the courts have consistently held statements by witnesses . . . to be the 'work product' of an attorney." Annot. 35A, L.R.3d 424 (1971) (footnotes omitted)(emphasis added). In State v. Montague, 101 N.J. Super. 483, 244 A.2d 699 (1968) the State sought access to the defendant's attorney's notes concerning interviews with prospective witnesses. The Court states:

> "[W]e are satisfied that the notes here in question represented the work product of defendant's attorney and under the doctrine of Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), production should not have been compelled. The fears therein expressed with regard to the inviolability of an attorney's thoughts and the possibility of inefficiency, unfairness and sharp practice are equally applicable to the setting of a criminal case." 244 A.2d at 702.

The same result has been reached with respect to the defendant's demands to examine materials (especially prospective witnesses' statements) in the hands of the prosecuting attorney. See State v. Bowen, 104 Ariz. 138, 449 P.2d 603, 607 (1969); State v. Superior Court, 99 Ariz. 382, 409 P.2d 547, 548 (1966); Fisher v. State, 241 Ark. 545, 408 S.W. 2d 894, 897 (1966); Edens v. State, 235 Ark. 178, 359 S.W. 2d 432,433 (1962); People v. Boehm, 270 Cal. App.2d 13, 75 Cal. Rptr. 590, 595-596 (1969) [further citations omitted]"

5/ (cont'd) In Re Grand Jury Proceedings, Duffy v. United States, 473 F.2d 840, 846 (8th Cir. 1973); United States v. Nobles, App.A, infra, at page 16A n.5 .; See also Comment, "'Work Product'" in Criminal Discovery", 1966 Wash. U.L.Q. 321 (1966). The constitutional protections of the Fifth and Sixth Amendments which shield defendant in a criminal case are broader and more complete than the protection offered by the work product rule. See parts 3 & 4 infra.

Thus, the rule specifically forbids government discovery of the investigator's report in this case, both because it is an internal defense document and because it is a statement of a government witness to an agent of the defendant. The proposed Amendments to the Rules leave unchanged this provision.

Petitioner claims that Rule 16 was "clearly intended to apply only to pre-trial discovery." [Petition at 23] However, the policy considerations supporting the work product savings clause of the rules are the same during the course of the trial as before trial. Moreover, subsection (b) of Rule 16, in setting limits to government discovery, provides, in pertinent part, that,

> This rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. §3500. [Jencks Act] (emphasis added)

The Court of Appeals properly concluded that this reference to the Jencks Act indicates that Rule 16 has relevance not only to pretrial discovery but also to the production of documents during trial. App. A, infra, p. 17A .

Though Rule 16 provides for reciprocity of disclosure, the Advisory Committee was careful not to expand prosecution discovery to the extent of defense discovery. The philosophy of criminal discovery is inconsistent with total reciprocity and "any suggestion that the state must have at least as good a chance as the defendant to prevail would seem to violate the traditional policy of favoring the defendant in order to avoid

conviction of the innocent." Note, "Developments in the Law, Discovery" 74 Harv. Law Rev. 941, 1063 (1961).

The Jencks Act, 18 U.S.C. §3500, is consistent with the limited authority for prosecution discovery found in Rule 16 and with the policy of limited reciprocity of disclosure. Section 3500, though expansive of defendant's post-testimony discovery powers over statements of government witnesses, provides for no reciprocal right of the government to statements collected in defense files. Not only does Section 3500 not authorize a trial judge to order disclosure of defense witness reports, it implicitly prohibits such a procedure. Thus, the Supreme Court in interpreting §3500 has emphasized that it is the exclusive authority by which disclosure during trial may be compelled. Thus, in Palermo v. United States, the court stated, ". . . statements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U.S.C. §3500 cannot be produced at all." 360 U.S. 343, 351 (1959). Absent any statutory compulsion similar to §3500, the exclusive terms of §3500 indicate that a court has no authority to require the defendant to surrender witness statements to the government.

The thrust of petitioner's argument is that this court should adopt a common law rule of evidence which would require defense counsel to turn over an investigator's portions of reports of interviews with witnesses after the investigator testifies for the defense on direct examination. 6/

6/ The petitioner's reasoning that the Court of Appeals decision may "foster misstatement, exaggeration, or even perjury on the part of . . . partisan investigators . . . " is misplaced. If a particular investigator is prone to exaggeration or perjury he can as easily misstate the interview in his report as on the stand. The appropriate method of impeaching the investigator in that situation as well as this, is to rehabilitate the government witness who can testify in rebuttal. Comments in footnote 8 of the petition at page 23 indicate that both the dissenting judge and petitioner were unaware of the fact that the original of the investigator's report in this case was placed under seal during the trial for the benefit of the Cort of Appeals. The report contains the exact words which defense attorney professed as Mr. Bond's impeaching testimony.

Such a rule would constitute legislating by the judiciary of a modified Jencks Act applicable to the defense. Not only would the rule significantly alter traditional trial procedures, but it would intrude upon an area in which Congress and the rule makers have spoken clearly in both the Federal Rules of Criminal Procedure and the Jencks Atc. See United States v. Wright, 489 F.2d 1181, 1190 (D.C. Cir. 1973) 7/

7/ The rule sought by petitioner also would modify Rule 612 of the Proposed Federal Rules of Evidence which provides that,

> "Except as otherwise provided in criminal proceedings by 18 U.S.C. §3500, if a witness uses a writing to refresh his memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness . . . ."

As noted by the court in United States v. Wright, 489 F.2d at 1191, "[t]he government's proposal would have us [do] away with the requirement that the statement be used to refresh recollection either before or while testifying."

3. The Court's Order Violated Defendant Nobles' Right Against Self-Incrimination Guaranteed By The Fifth Amendment

The Court of Appeals need not have considered the Fifth Amendment in reaching its decision. However, the Court was correct in finding that the Amendment prohibits government discovery of the defense investigator's report.

The United States Supreme Court has held, "There are rights of a constitutional stature whose exercise a State may not condition by the exaction of a price." Garrity v. New Jersey, 385 U.S. 493, 500 (1967). In this case, the respondent paid a double price for exercise of his Fifth Amendment right against self-incrimination. Not only was respondent forced to forfeit valuable testimony tending to impeach the prosecution's best identification witness, but respondent suffered irreparable prejudice when the U.S. Attorney called the jury's attention to respondent's failure to produce that testimony. This Court traditionally has been solicitous about the Fifth Amendment rights of defendants and has refused to allow the government to obviate those rights by indirection and manipulation. Boyd v. United States, 116 U.S. 616 (1886) (in a civil forfeiture action, court would not condone the choice between producing a document or forfeiting his goods); Slochower v. Board of Education, 350 U.S. 551 (1956) (public school teacher cannot be discharged merely because he invoked Fifth Amendment); Garrity v. New Jersey, supra, (policeman cannot be forced to chose between his job and taking the Fifth); Spevack v. Klein, 385 U.S. 511 (1967) (attorney cannot be disbarred because he invoked Fifth Amendment protections); Brooks v. Tennessee, 406 U.S. 605,610-611 (1972) (rule requiring that defendant be first in order of defense witnesses '"cuts down on the privilege [to remain silent] by making its assertion costly."')

The Fifth Amendment protects the accused from "being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. . . ." Schmerber v. California, 384 U.S. 757, 761 (1966)

That a written report constitutes evidence of a communicative nature was recognized by this Court as long ago as the last century when the Court stated that ". . . we have been unable to perceive that the seizure of a man's private books and papers to be used against him is substantially different from compelling him to be a witness against himself." Boyd v. United States, 116 U.S. 616, 633 (1886).

The government suggests that the privilege adheres only to the defendant and cannot include documents in the investigator's possession. [Petition at 17, 18] However, the fact that the reports are those of the investigator does not affect the protection afforded defendant Nobles. It has sometimes been stated that the documents sought must be held in a personal capacity by the individual exercising the right. See United States v. White, 322 U.S. 694 (1944). This qualification prohibits a labor union representative from withholding papers because he held the papers which belonged to the union, not to him, in his capacity as an official of the union. Id. The present case is distinguishable. The fact that the investigator and not the defendant, himself, holds the documents makes no difference. The attorney is clearly the client's agent. United States v. Judson, 322 F.2d 460 (9th Cir. 1963) 8 J. Wigmore, Evidence, §§2270, 2307 (McNaughton Rev. 1961.) An attorney's investigator, while working on the client's case, is likewise the agent of the client. As such, he can assert the privilege against self-incrimination on behalf of the client.

To hold that a document is protected if obtained and held by the client himself or if transferred from the investigator to the client but not if held by the investigator or the attorney is unreasonable, and may impede the preparation of a case by the attorney because of his consequent inability to adequately familiarize himself with all the documents. Thus, if the investigator cannot assert the privilege if he had conducted the interview, the defendant without an attorney is granted protection not accorded the defendant represented by counsel. An "intolerable" tension is created when the defendant is placed in the position of choosing whether to forego the benefit of counsel in order to protect documents by asserting his Fifth Amendment privilege, or making his documents vulnerable to perusal by the prosecution in order to have the benefit of counsel. Simmons v. United States, 390 U.S. 377, 392 (1968). An option which exacts such a "penalty" upon the exercise of the privilege against self-incrimination violates the Fifth Amendment. Malloy v. Hogan, 378 U.S. 1 (1964); Griffin v. California, 380 U.S. 609 (1965); Spevack v. Klein, 385 U.S. 511 (1967).

The petitioner also asserts that the "privilege applies only to . . . some communicative act or writing of the defendant himself. . . ." (Petition at 17). However, as pointed out by the Court of Appeals for the District of Columbia, "This line of analysis . . . is plainly inconsistent with the rationale of the privilege." United States v. Wright, at 1193, n.15.

If the defendant took witnesses' statements on his own, he could not be compelled to produce them as long as they were in his rightful possession. The person asserting the privilege does not have to have actual ownership.

/

Rightful possession in a "personal capacity" is sufficient. United States v. White, 322 U.S. 694 (1944). M. Moore, "Criminal Discovery" 18 The Hastings Law Journal, 865, 907 (1968). The testimonial disclosure implicit in documents which do not include a defendant's statements is the "witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded. . . ." 8 J. Wigmore, Evidence §2263 at 379 - 80 (McNaughton Rev. 1961).

This court has defined one of the underlying policies of the privilege as "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt. . . ." Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55 (1964). He faces this trilemma whenever the government forces the defendant to produce a document regardless of whether the document contains his statements or the statements of other witnesses. 8/

8/ "He can produce the sought after document, thereby implicitly stating that the document produced is the one requested, and provide evidence against himself. He can perjure himself in two ways: he can refuse production on the ground that he does not have the requested item, or he can produce something other than the document requested - for example, a forged non-incriminating version of the document. Or he can simply refuse production and subject himself to a contempt sanction. Compelled production of a document in the possession of the defendant, whether or not it is a document written by the defendant, thus involves a "communicative act" by the defendant within the protection of the privilege. '[I]t is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental complusion which it is the purpose of the privilege to prohibit.' Couch v. United States, supra, 409 U.S. at 330 n. 12, 93 S.Ct. at 617, quoting United States v. Cohen. 9th Cir., 388 F.2d 464, 468 (1967)." United States v. Wright, 489 F.2d 1181, 1193 - 4, n. 15 (1973). (D. C. Cir. 1973).

United States v. Wright, 489 F.2d 1181, 1193 - 4 (1973); In Re Grant, 198 F.708, 709 (S.D.N.Y., 1912) (Hand, J.), aff'd., 227 U.S. 74 (1913).

The petitioner contends that the respondent waived his right to be free of self-incrimination following an election to place the investigator on the witness stand. However, the investigator did not take the stand as an impeaching witness. Therefore, the order covering his report was premature and any argument that he waived the privilege by taking the stand is misplaced.

The Supreme Court has held that the due process clause of the Fifth Amendment places a burden on the government to provide the defense with material favorable to it. Brady v. Maryland, 373 U.S. 83 (1963). The defense has no commensurate obligation, for the self-incrimination clasue of the Fifth Amendment shields the defense from providing information to the government which would aid its prosecution.

The privilege against self-incrimination extends not only to testimony which may be conclusive on the issue of guilt but applies broadly to information which might furnish "a link in the chain" against the accused. Hoffa v. United States, 385 U.S. 293, 304 n.7 (1966) Hoffman v. United States, 341 U.S. 479, 486 (1951).

The Supreme Court of California has explained, ". . . the principal element in determining whether a particular demand for discovery should be allowed is . . . whether disclosure thereof conceivable might lighten the prosecution's burden of proving its case in chief. . . ." Prudhomme v. Superior Court of Los Angeles County, 2 Cal. 3d 320, 326, 85 Cal. Rptr. 129, 133 (1970). A defendant, in order to invoke the privilege, need make no showing that the

/

document sought is incriminating, "for the very fact that the prosecution seeks it establishes that in the prosecution's view, it may be incriminating." Jones v. Superior Court, 58 Cal. 2d 56, 60, 22 Cal. Rptr. 879, 881 (1962). See Miranda v. Arizona 384 U.S. 436, 460 (1966).

The petitioner's reliance on this Court's decision in Williams v. Florida is misplaced. That opinion upheld the validity of a state statute requiring the defense to give prior notice to the prosecution of defendant's intention to present an alibi and upon motion by the government, to reveal the names of the alibi witnesses. Williams v. Florida, 399 U.S. 78, 82 (1970).

The statute did not require that the alibi witnesses surrender memoranda written in connection with the events, much less force them to disclose internal defense reports. 9/

The alibi statute affects only the timing of the disclosure of evidence which the defense would ultimately present since the fact that the defense relies on an alibi and the names of witnesses would be revealed during the defense case. In this case,however, the government sought portions of a confidential report from an investigator to an attorney which the defense never intended to introduce into evidence.

This case does not present the issue as did Williams as to whether there would be ". . . self-incrimination problems if . . . the state was permitted to . . . take the deposition of the witness and find rebuttal evidence." Id. at 85.

9/ The rulemakers have specifically prohibited discovery of reports of interviews by defense investigators of government witnesses, Rule 16(c), Federal Rules of Criminal Procedure, see part 2, supra. Thus, instead of acceeding to the judgment of rulemakers as this court did in Williams, the trial court, in the instant case, took a position directly contrary to that of the rulemakers. It should be noted that proposed Rule 16 provides for the disclosure of alibi witnesses but continues to specifically prohibit discovery of the reports focused on in this case.

The defense offered no objection to the government presenting rebuttal evidence such as the testimony of the government witness the defense sought to impeach or the testimony of other witnesses who may have been present at the interviews. Neither did the defense ever object to revealing the name of its impeaching witness, John Bond, or to a government interview of him.

Thus, the holding in Williams offers no support for the unusual order of the trial court. Furthermore, the policy reason, avoidance of undue surprise, which justified discovery of the alibi defense and the names of alibi witnesses in Williams is simply inapplicable in the impeachment situation.

First, the defense never knows whether it will call impeaching witnesses until the government witness takes the stand at trial and testifies in a manner which is inconsistent with his prior statements. Second, the benefit to the government derived from an opportunity to investigate an alibi defense is not ordinarily a valid consideration when dealing with impeachment testimony. Such evidence is not susceptible to the kind of on-the-scene investigation which law enforcement officers often conduct when confronted with the contention that defendant was at another place when the crime occurred.

The serious potential danger lies in the fact that if impeachment of a defense witness is to be permitted by use of an internal defense memorandum, clearly courts are going to order, at the least, that defense counsel produce material in the memorandum "relating" to the statement sought to be impeached. Then, information not previously known to the government, helpful to it and arguably inappropriate for impeachment, would be revealed and could be used by the government in cross-examination, in rebuttal, or at a new trial. 10/

10/ The problem is not solved by permitting in camera examination by the court. Neither the prosecuting attorney nor the presiding judge should be permitted to peruse sections of internal defense files.

FYI-Sandstone
8-1-74 - 1003 - 1073

The government's proposal is seductive, but "[T]hose who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that 'illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.' Boyd v. United States, 116 U.S. 616, 635 (1886)." Miranda v. Arizona, 384 U.S. 436, 459 (1966).

As a result, they made the privilege "as broad as the mischief against which it seeks to guard." Id, at 459-60. The Court of Appeals correctly recognized that the entire investigator's report fell within that privilege.

4. Court's Order Improperly Impinged Upon Confidentiality Of Communication Among Members Of Defense Team

The ability of a defendant to establish his innocence is severely eroded if the results of the investigation and preparation of his case are disseminated to the government. The rulemakers and the courts have seen fit to draw a cloak around the defense team to protect its investigative efforts. This cloak takes form variously as an obligation on the defense team not to reveal confidential material without the express consent of the defendant, restrictions on court ordered disclosure, and a prohibition against governmental intrustion into the defense camp. Contrary to petitioner's assertion that the Court of Appeals' opinion conflicts with the "philosophy of prior decisions of this court", the opinion reflects the increasing concern of the law with the sanctity of defense communications.

The attorney-client privilege traditionally has placed an obligation on members of the defense team to refrain from

FYI-Sandstone
8-1-74 - 1003 - 1073

revealing confidential communications of the client made in connection with the case. The Court of Appeals noted that the scope of the privilege has been extended in Rule 503 of the Proposed Rules of Evidence promulgated by the Supreme Court to arguably include a "communication as existed between the investigator and counsel for the defense." 11/ [App.A,infra, at page 8A]

In addition, the American Bar Association has urged that in some instances an attorney should not reveal communications from third parties. 12/

This Court has approved the judicially created work product doctrine. Hickman v. Taylor, 329 U.S. 495 (1947). Its scope encompasses investigative reports to an attorney in a criminal case. 13/ See discussion at Note 5 , supra.

11/ Rule 503(b) provides that a client has a privilege to prevent disclosure of confidential communications made during the preparation of his case "(2) between his lawyer and the lawyer's representative. . . ." 56 F.R.D. 183, 236 (1972). Although the tentative draft of the House version contains only a general rule, the rule permits the promulgation of regulations by the Supreme Court pursuant to its statutory authority. U.S.L.W. Supplement, p. 6, July 17, 1973.

12/ "To hold that an attorney should reveal confidential information which he has obtained, by virtue of his professional employment, from members of the family of a criminal would prevent such frank disclosure as might be necessary to a proper protection of the client's interest." Formal Opinion No. 23, ABA Committee on Professional Ethics. (January 24, 1930)

13/ "Similarly . . . the doctrine of Hickman v. Taylor exempts from discovery certain 'work product' of the attorney: including records of communications to him from third persons not within the attorney-client privilege". Annotation, Development, since Hickman v. Taylor, of Attorney's Work Product Doctrine", 35 ALR 3d 412

FYI-Sandstone
5-1-74—100M—1073

The Sixth Amendment's guarantee of counsel also serves to ensure privacy during defense preparations of a case. 14/ As a result, the protections which modified attorney-client privileges and the work product doctrine afford, are subsumed by the cloak in which the constitutional right to effective assistance of counsel surrounds a defendant in a criminal case.

A defendant is entitled to the effective assistance of counsel "at every step in the proceedings against him." Powell v. Alabama, 399 U. S. 1, 7 (1970); Glasser v. United States, 315 U. S. 60, 76 (1942). Included in the concept of effective assistance of counsel is the presumption that counsel will investigate a case thoroughly and will interview witnesses. See Powell v. Alabama, supra, at 58; Griffin v. Illinois, 351 U. S. 12 (1956); United States v. Germany, 32 F.R.D. 421 (M.D. Ala. 1963); ABA Standards, Providing Defense Services § 1.5 (Approved Draft, 1968); The Defense Functions §.1 (Approved Draft, 1971).

Clearly the defense attorney, to carry out his obligations, must work with assistants such as secretaries and investigators. These individuals become part of the defense team and agents of the attorney and the defendant. The members of the defense team must be able to communicate with each other. Considerations of efficiency and accuracy demand that certain of these communications be in writing. Thus, an investigator implements the defense team's obligation to interview witnesses by speaking with the witness, and writing a report to the attorney setting forth the content and his impressions, of the discussions.

Sixth Amendment considerations are involved in at least two distinct ways. First, the government, by securing

14/ See Memorandum of the District of Columbia Public Defender Service filed in connection with United States v. Wright, supra.

FYI-Sandstone
5-1-74—100M—1073

an order forcing the defendant to provide it with portions of the report, improperly intrudes upon the defense communication system. In terms of the effective assistance of counsel, it makes absolutely no difference whether the conversation is between the attorney and his client, or between the attorney and his agents, or between a member of the defense team and witnesses. See Hoffa v. United States, 385 U.S. 293, 305-7 (1966).

This court has condemned the government's invasion of a defense camp by means of an informer who observed interviews between the attorney and several defense witnesses. In Hoffa v. United States, supra, the court stated that the defendant would have been entitled to a new trial if he had been convicted, since, ". . . a surreptitious invasion by a government agent into the legal camp of the defense may violate the protection of the Sixth Amendment. . . ." Id. at 306. See Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953); Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951); In Re Terkeltaub, 256 F.Supp. 683 (S.D.N.Y. 1966).

Disclosure of portions of the defense report places the government in the camp of the defense with ears to listen to the interview of the witness by the investigator, and eyes to read portions of the confidential report the investigator wrote the attorney.

A second Sixth Amendment consideration is the chilling effect that disclosure of such reports would have on a defense team, and the consequent ineffectiveness of counsel that would result. Investigators would cease writing reports. Then, as this court recognized in the context of work product, inefficiency and inaccuracy would inevitably develop in the ". . . preparation of cases for trial", Hickman v. Taylor, 329 U.S. 495, 510-11 (1947). "The effect

on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." Id.

The Sixth Amendment's concern for effective communication between members of the defense team was recognized in United States v. Venuto, 182 F.2d 519 (3d Cir. 1950). The court in that case held that the defendant was denied the right to counsel when the court ordered the defendant and his attorney not to speak to each other during an eighteen hour recess in the midst of defendant's testimony at trial. Id. at 522.

The trial court's order in the instant case, by permitting government incursion into the defense camp when an investigator writes a report and at trial impeaches a witness, places an impediment in the way of effective defense communications, potentially as serious as an order that counsel and defendant not confer with each other during a particular recess.

Such an impediment improperly exacts a price for the exercise of rights of constitutional stature. See Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

BEST COPY AVAILABLE

5. The Court's Order Forbidding John Bond From Testifying As To Prior Inconsistent Statements Of Government Witnesses Denied Defendant The Right Of Cross-Examination

The Sixth Amendment forbade the trial court from enforcing its discovery rule against respondent who refused to comply, by excluding relevant, probative evidence. The right to cross-examine witnesses is guaranteed by the confrontation clause of the Sixth Amendment and has been labeled as a "fundamental right", essential to a fair trial. Pointer v. Texas, 380 U.S. 400, 403 (1965); See Bruton v. United States, 391 U.S. 123 (1968). The court stated in Kirby v. United States, 174 U.S. 47, 55, 56 (1899), that the right of confrontation is "[o]ne of the fundamental guarantees of life and liberty," and "a right long deemed so essential for the protection of life and liberty that it is guarded against legislative and judicial action by provisions in the constitution. . ." An integral part of cross-examination is the opportunity of the cross-examiner to impeach the credibility of a witness. As the Supreme Court has stated, ". . . certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. Pointer v. Texas, 380 U.S. 400, 403 (1965).

Impeachment by showing prior inconsistent statements or prior statements revealing bias or prejudice involves the use of an impeaching witness. The cross-examination of a witness is effectively denied a defendant when he is unable to introduce testimony that the witness made a prior

inconsistent statement or a statement showing bias or prejudice. No comparable constitutional right is involved in the government's examination of a defense witness, such as John Bond. This Court has stated that:

> ". . . [C]ross examination of a witness is a matter of right . . . . Its permissible purpose, among others, are . . . that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue and biased. . . .
>
> * * * *
>
> ". . . Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . ." Alford v. United States, 282 U.S. 687, 691, 692 (1931).

Respondent Nobles was denied the opportunity to put the weight of the testimony of Van Gemeren and Hoffman and their credibility to a test, and to permit the jury to fairly appraise them, when the court ordered that John Bond not testify to the statements given him in interviews with Hoffman and Van Gemeren.

6. Any One Of Three Additional Issues Raised By The Respondent In His Brief Before The Court Of Appeals Warranted Reversal Of The Conviction Of Mr. Nobles, And Justifies Denial Of The Petition For Writ Of Certiorari.

a. The Misconduct Of The Prosecutor Denied Defendant Due Process Of Law Guaranteed By The Fifth Amendment.

Although the Court of Appeals stated that the conduct of the prosecutor did not require reversal, respondent respectfully submits that his flagrant misconduct justifies denial by this Court of the Petition for Writ of Certiorari, since it constitutes a separate grounds justifying reversal of the conviction in United States v. Nobles.

During the trial, the prosecutor improperly interrupted defense counsel's questioning of government witnesses to misstate and repeat prior testimony of the witnesses in the presence of the jury.

For example, Van Gemeren testified that he saw the side and back of the man under the surveillance camera. [R.T. 89] He also testified that he could not recall whether the man under the surveillance camera was facing towards him or away from him but "thought" that he could see a side view for half a minute. He admitted that the man's back was toward him "most of the time." [R.T. 38-39]

Despite this testimony, the prosecutor rose to his feet to make an objection to defense counsel's cross-examination and stated in the presence of the jury, "This witness has testified as to the fact that he observed this person's face, that he then turned toward the bank manager, he saw him from the side and from the front." [R.T. 67] In fact, Van Gemeren

never testified that he had seen the man "from the front" or that he observed his "face".

During the cross-examination of Hoffman, defense counsel attempted to establish that Hoffman did not see a front view of the man alleged to be Nobles. Hoffman testified, "he would have been generally facing toward the teller area, and then occasionally shifting to his right. . . ." [R.T. 351] The teller area was directly opposite the side of the bank where Hoffman and Nobles were alleged to have been standing. The next question was interrupted by the prosecutor who stated, "He said he faced both ways, toward the witness and toward the tellers' area." [R.T. 352] In fact, Hoffman never testified that the man faced towards him.

During closing argument, the prosecutor made a number of misstatements which severely prejudiced respondent. He said that the lineup which Hoffman attended and from which he picked out Mr. Nobles, occurred 16 days after the robbery. [R.T. 676-77] In fact, the lineup occurred over seven weeks after the robbery. The misstatement struck at the essence of the defense theory that a substantial length of time between the robbery and the lineup made the identifications suspect. [R.T. 401, 404, 710, 711]. The prosecutor also stated that Mr. Hoffman testified that a struggle involving a witness and Mr. Nobles made him particularly aware of Nobles. [R.T. 676] In fact, Mr. Hoffman did not so testify [See R.T. 328]. In addition, the prosecutor's statement that the testimony that Robert Nobles was under the surveillance camera was "uncontradicted" not only misrepresented the evidence but constituted an improper comment on defendant's right not to testify. [R.T. 162-63, 194, 563, 740].

The prosecutor also improperly intimated that an independent determination of defendant's guilt had been made

prior to trial, and improperly expressed a personal opinion as to the honesty of government witnesses. [R.T. 737-8, 742, 747]. In addition, the prosecutor improperly stated that the government possibly could have brought ten more witnesses into the courtroom who would have identified Mr. Nobles, thereby denying defendant the right of confrontation of those witnesses. Finally, the prosecutor improperly and prejudicially stated on four occasions that Mr. Nobles' alibi witness worked as a nude dancer, and also stated that she was "shacking up" with defendant Nobles.

This Court's statement in Berger v. United States, 295 U.S. 78 (1935) is applicable to this case:

> "[We] have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance of, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

FPI-Sandstone
5-1-74—100M - 1073

b. Admission Into Evidence Of Statement Taken In Violation Of Miranda v. Arizona Constituted Reversible Error.

The Court of Appeals did not comment on defendant's contention that the admission of Robert Nobles' statement violated the provisions of Miranda v. Arizona. Robert Nobles in response to a question by officers after his arrest, and before Miranda warnings were given, denied that he was Robert Nobles.

The admission of this statement constitutes a separate grounds justifying the reversal of defendant Nobles' conviction and the denial of the petition.

c. The Trial Court Erred In Refusing To Permit Testimony Of Defendant Nobles' Expert On Eyewitness Identification.

The Court of Appeals found no error in the trial court's refusal to permit the testimony of a defense expert on eyewitness identification. App. A, infra, at page 8A. Respondent urges that the trial court's decision was erroneous and constitutes a separate grounds justifying the reversal of defendant Nobles' conviction and the denial of the petition.

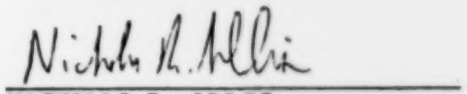
FPI-Sandstone
5-1-74—100M—1073

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

JOHN K. VAN DE KAMP
Federal Public Defender



NICHOLAS R. ALLIS
Deputy Federal Public Defender

Rm 707, United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-4796

Counsel for Respondent

DATED: December 24, 1974

FPI-Sandstone
5-1-74—100M—1073

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. ____

UNITED STATES OF AMERICA, Petitioner

v.

ROBERT LEE NOBLES, Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December, 1974, a copy of Motion for Leave to Proceed In Forma Pauperis, Affidavit and Brief Opposing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, were air mailed postage prepaid, and special delivery, to the Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, counsel for the Petitioner.

JOHN K. VAN DE KAMP
Federal Public Defender

NICHOLAS R. ALLIS
Deputy Federal Public Defender

Rm 707, United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-4796

Counsel for Respondent

FPI-Sandstone
5-1-74—100M—1073

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. TOMMIE LOUIS BROWN, *Defendant-Appellant.*	No. 73-2279
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. VIRGIL DAVID SWAIN, *Defendant-Appellant.*	No. 73-2678
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ROBERT LEE NOBLES, *Defendant-Appellant.*	No. 73-2280

[June 10, 1974]

Appeal from the United States District Court
for the Central District of California

Before: ELY and KILKENNY, Circuit Judges, and
ENRIGHT, District Judge*

ENRIGHT, District Judge:

In late morning on February 6, 1973, four men robbed a Crocker National Bank in Los Angeles. Three men were brought to trial in April, 1973, for the offense: defendants Tommie Louis

*The Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX "A"

BEST COPY AVAILABLE

Brown, Robert Lee Nobles, and Virgil David Swain. The fourth man, whose name appeared on the indictment as Jonathan Ray Nobles, was a fugitive at time of trial.

The government's theory was that Brown jumped behind the tellers' windows and moved down the line of cages, collecting money from the cash drawers, while the other three guarded the customers and personnel from various positions. A surveillance camera took pictures of all the participants except the one who stood beneath the camera, allegedly defendant Nobles [hereinafter Nobles].

I *The Brown and Swain Appeals*

The evidence against Brown and Swain was similar and consisted of surveillance photographs, items taken from the apartment they shared, a comparison of photographs, eyewitness identifications, and a statement by Brown.

Defendants Brown and Swain primarily attack the comparison of certain photographs. One group of photographs consisting of enlarged surveillance pictures showing the faces and clothing of the two robbers alleged to be Brown and Swain, were placed on a chart next to a second group of photographs consisting of enlarged police pictures of Brown and Swain as well as FBI photographs of the items of clothing seized from their apartment. An FBI expert in photographic identification, Frederick E. Webb, compared the two groups of photographs and stated that the faces in the police photographs were the same faces as those in the surveillance photographs. He also testified that the clothing in the two groups of photographs was the same, and further, he made a similar analysis of a surveillance photograph of a pistol used in the robbery and a FBI photograph of the handgun seized in the apartment.

When Mr. Webb, in response to the prosecutor's questions, began to state his opinion that Brown and Swain were indeed two of the three pictured on the surveillance film, the district court overruled the defense objection but not without some misgiving:

> I must say in my own personal opinion it comes very, very close to impinging upon the province of the jury . . . . that case [*United States v. Cairns*, 434 F.2d 643 (9th Cir.

1970)] I suggest to you, Mrs. Broady, which seems to authorize this very procedure.

Reporter's Transcript [hereinafter R.T.] 260, lines 5-11. We too are troubled by the proffered testimony.

In *Cairns*, this circuit previously wrote:

> Appellant next contends that over his objection on the ground the testimony would invade the province of the jury, Government's witness, a special agent with the Federal Bureau of Investigation and photographic identification specialist, compared two photographs: a photograph taken by the bank's surveillance camera at the time of the robbery and a police photograph of appellant taken ten days prior to trial. To assist in his identification, he enlarged the head area of the surveillance photograph to the same size as the enlarged head area in the police photograph. The witness then pointed out the similarity in the two photographs in the nose and mouth areas, chin line, hair lines, ear contours and inner folds of the ears, among other things. He then testified that based on all the general characteristics the individual in the surveillance photograph is the individual in the police photograph "or another individual having all of these characteristics as to nose, mouth, chin, and the ear characteristics . . . . "We see no error in the admission of this testimony. While the jury is the sole judge of the facts, expert testimony has long been admissible as an aid to the jury.
>
> 434 F.2d at 644.

That concluding statement is undisputed. But whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952).

Advisory Committee's Note to Proposed Federal Rule of Evidence 702, Court Version, 56 F.R.D. 183, 282 (1972). To permit an expert to testify as to his opinion of parentage based on the resemblance of a child to a reputed father in a paternity suit would be grossly inappropriate by the above standard. But just as surely, fingerprint identification, the comprehensive examination of aerial photographs, and other similar scientific and technical evaluations, are obviously within the realm of permissible expert testimony. Testimony as to whether a particular individual is portrayed in a photograph rests on some middle ground. Since the Cairns decision relied solely upon traditional expertise fields, we feel it incumbent upon ourselves to reexamine the issue faced in *Cairns*.

We have requested and reviewed the briefs submitted in *Cairns*. Such review allows us to conclude that the two cases—*Cairns* and the instant one—are distinguishable.

In the instant case, Webb's testimony was general. In reference to the photographs of Brown, he stated broad conclusions: "rather thin-faced," "somewhat elongated," "[t]he mustache is similar, the shape of the nose, the eyes, the eyebrows, ..." R.T. 260, lines 22-24. In *Cairns*, however, the testimony was of greater detail. Not only did the agent compare general contours and shapes but also found ear and lobe formations particularly significant and termed a particular facial crease as "distinctive" and "unusual." Government's Brief, *United States v. Cairns*, p. 5. In its argument to this court in *Cairns*, the government also emphasized the detail of the agent's testimony, for example, his comparison of a nipple in the center of the defendant's ear. *Id.* at 6.

We would hold that *Cairns* should be limited to the precision as argued in its briefs; therefore, when a party seeks to introduce expert testimony on personal photographic identification—whether to prove *or* disprove similarity, he should first be required to make an offer of proof to the court outside the presence of the jury.

After the elicitation of what facts the expert has depended upon in reaching his conclusions, the court should determine whether it has been convinced by a preponderance that the facts offered are beyond the jury's common experience. Of course, the

court in reaching its determination must take into consideration that the party desiring admission may be free to argue his position without the benefit of expert testimony. If the court in its discretion, which may not be disturbed absent clear abuse, is convinced that the expert may materially assist the jury beyond their common experience as amplified by argument of counsel, the expert should be allowed to testify.

The same general test should be applied to the photographic identification and comparison of inanimate objects. The trial courts, however, should be cognizant that while the everyday experiences of twelve laymen over their combined lifetimes may permit them to make photographic comparisons of persons, they may utterly lack experience to distinguish or recognize certain objects such as firearms. In the facts of this particular case, we would hold the admission of the expert's opinion on the personal identification of Brown and Swain to have been error,[1] but his testimony concerning the items seized to have been properly admitted. We cannot conclude, however, that the error was prejudicial. Disregarding the agent's opinion as to their identity, the evidence against Brown and Swain—the eyewitness testimony, the discovery of the items—was overhelming, rendering the error harmless.

[1]The photographs introduced in this case afford a spectrum for aiding a trial court in determining when expert testimony may be permitted. There can be no reasonable doubt that the pictures of the robber who moved from cage to cage was indeed defendant Brown. The resolution of the camera is clear; his likeness unmistakable. Testimony of an expert would be of no useful purpose and hence error, but presumably, harmless.

The pictures of the man who stood to the rear of the bank are of poor resolution and quality. The only articulable characteristics concerning which the expert could testify were generalities, *e.g.*, facial contours, shape of sideburns. This foundation would be inadequate, and expert testimony would be error, perhaps prejudicial, depending upon the state of other evidence.

The third pictured individual was the fugitive, allegedly Jonathan Nobles, brother of defendant Nobles. The resolution of the surveillance pictures is clear, but the conclusion that the individual is Jonathan Nobles after comparison with a known photograph of Jonathan Nobles is not entirely free of doubt. An expert, in our opinion, could be useful. Of course, the discretion would lie with the trial court.

II *Nobles Appeal*

The evidence against Nobles differs from the case against Brown and Swain. Most obvious is the absence of surveillance photographs, for Nobles is alleged to have been the robber who stood underneath the camera rather than within its scope. Second, no objects were found to connect him to the offense in contrast to the items seized at the apartment of Brown and Swain. Finally, the eyewitness testimony was far less impressive against Nobles than against Brown and Swain.

A bookkeeper at the bank identified Brown and Swain in court as well as the items of clothing. He could not identify Nobles. Similarly, the assistant branch manager identified Brown and Swain in court but could not identify Nobles.

A bank teller, Peter van Gemeren, identified Brown in court. He did identify Nobles but his testimony was subjected to extensive cross-examination. Likewise, Gary Hoffman, a salesman visiting the bank, pointed out the men alleged to be Brown and Swain on the surveillance photographs and described their activities; he too identified Nobles as having stood by the business counter. Defense also subjected Hoffman to arduous cross-examination.

Although Nobles presented an affirmative alibi defense, his strongest attack was to discredit the key evidence against him: the eyewitness identification by Van Gemeren and Hoffman. To do so, his counsel not only employed cross-examination but also attempted to introduce expert opinion testimony on the frailties of eyewitness examination in general and to impeach the specific eyewitnesses by statements made by them to his investigator.

A. *Expertise on Eyewitness Identification*

Nobles offered the testimony of Dr. Robert Buckhout as an expert witness to describe the problems of eyewitness identification in general and the specific difficulties with the identifications in this case. The court refused the proffered testimony, concluding that the testimony would invade the province of the jury, that the undue consumption of time would substantially outweigh its probative value, and that the offer of proof was inadequate. We in turn cannot conclude that the trial court was in error. *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973).

BEST COPY AVAILABLE

B. *Impeachment*

During the defense case, counsel sought to introduce the testimony of John Bond, chief investigator for the Federal Public Defenders. Mr. Bond had interviewed the witnesses Van Gemeren and Hoffman. On cross-examination Van Gemeren had testified that he did not recall telling Bond that he had seen only the back of the bank robber beneath the camera; Hoffman, during cross-examination, had denied telling Bond that all blacks look alike. Defense counsel's offer of proof was that Mr. Bond would testify that Hoffman had told him that "all blacks look alike" and that Van Gemeren had told him that "as far as the man at the surveillance camera is concerned, he [Van Gemeren] only saw the back of that man." Eventually, the court ordered that impeachment of the witnesses by Bond through these statements would be conditioned upon the defense agreeing to render to the government upon completion of the investigator's testimony the alleged statements as contained in the investigator's report. Rather than submit to this condition, defense counsel chose to forego impeachment, preferring to stand upon his client's right against self-incrimination as well as the protection of a work product rule.

For the reasons stated below, we would hold that, despite the very limited and seemingly judicious restriction on the defense, conditioning impeachment with prosecutorial discovery was prejudicial error. Admittedly, the order was narrowly drawn. But to single out any one witness and require as a condition precedent that his previous statement be produced is inappropriate. The defendant must have the essential right to call an impeaching witness; he need not corroborate the credibility of that witness before calling him to the stand, *i.e.*, by producing a prior recorded or transcribed statement. Were it otherwise, we would fear that such requested discovery would become a matter of routine, a result we desire to avoid.

Although defense counsel did not argue that the condition impinged on the attorney-client privilege, we deem it appropriate to comment on the relevance of that privilege.

The proposed Rules of Evidence as tentatively promulgated by the Supreme Court [hereinafter Court version] included Rule

503, Lawyer-Client Privilege. 56 F.R.D. 183, 235-240 (1972). That rule in pertinent part states:

> (a)(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.
>
> (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional services to the client, ... , (2) between his lawyer and the lawyers representative, ...

Id. at 236. In contrast, the tentative draft of H.R. 5463, 93rd Cong., 1st sess., as amended by the Subcommittee on Criminal Justice, House Committee on the Judiciary [hereinafter House version], contains no specific privilege rules. The House version would promulgate only a general rule, Rule 501, which provides that privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience . . . ." U.S.L.W., Supplement, p. 6, July 17, 1973. The rule does, however, further provide that the Supreme Court may prescribe rules pursuant to statutory authority. Thus, the Supreme Court may some day prescribe rules such as Rule 503 of its version, the literal meaning of which may arguably serve to protect a communication as existed between the investigator and counsel for the defense.

But absent any prescribed rules, common law dictates the federal rules of evidence, and the common law does not protect communications from third persons:

> Since the privilege is designed to secure subjective freedom of mind for the client in seeking legal advice . . . , it has no concern with other persons' freedom of mind nor with the attorney's own desire for secrecy in conduct of a client's case. It is therefore not sufficient for the attorney, in invoking the privilege, to state that the information came somehow to him while acting for the client nor that it came from some particular *third person* for the benefit of the client.

BEST COPY AVAILABLE

8 Wigmore, Evidence (McNaughton rev. 1961), § 2317(2) (emphasis original).

Defense counsel did strongly assert that to condition impeachment in the manner ordered could infringe upon his client's right against self-incrimination. This problem is indeed troubling.

When Federal Rule of Criminal Procedure 16 was amended in 1966, Justices Black and Douglas dissented. Justice Black wrote: "I am reasonably certain, however, that the Court's transmittal does not carry with it a decision that the amended rules are all unconstitutional. . . . And I agree with my Brother DOUGLAS that some of the proposed criminal rules go to the very border line if they do not actually transgress the constitutional right of a defendant not to be compelled to be a witness against himself." 39 F.R.D. 252, 272 (1966). And Justice Douglas stated:

> The extent to which a court may compel the defendant to disclose information or evidence pertaining to his case without infringing the privilege against self-incrimination is a source of current controversy among judges, prosecutors, defense lawyers, and other legal commentators. A distinguished state court has concluded—although not without a strong dissent—that the privilege is not violated by discovery of the names of expert medical witness whose appearance at trial is contemplated by the defense. I mean to imply no views on the point, except to note that a serious constitutional question lurks here.
>
> The prosecution's opportunity to discover evidence in the possession of the defense is somewhat limited in the proposal with which we deal in that it is tied to the exercise by the defense of the right to discover from the prosecution. But *if* discovery, by itself, of information in the possession of the defendant would violate the privilege against self-incrimination, is it any less a violation if conditioned on the defendant's exercise of the opportunity to discover evidence? May benefits be conditioned on the abandonment of constitutional rights? See, *e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 403-406, 83 S.Ct. 1790, 1793-1795, 10 L.Ed.2d 965. To deny a defendant the opportunity to discovery—an opportunity not withheld from defendants who agree to prosecutorial discovery or from whom discovery is not sought—merely because the

9A

> defendant chooses to exercise the constitutional right to refrain from self-incrimination arguably imposes a penalty upon the exercise of that fundamental privilege.

39 F.R.D. at 277 (footnote omitted).

The "distinguished state court" decision, referenced in the omitted footnote, is *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). In *Jones*, the defendant charged with rape requested a continuance of trial, alleging that he had been impotent for a long time, and the continuance was necessary to gather essential medical evidence. The prosecution responded with a motion for discovery of witnesses, reports, and data concerning the alleged impotence. In holding that the prosecutorial discovery was proper, the California Supreme Court concluded that "since the criminal discovery permitted to the defendant is the result not of a constitutional mandate of due process but rather of the desire to promote orderly ascertainment of truth [discovery] should not be a 'one-way' street." G. Lapides, *Cross-Currents in Prosecutorial Discovery: A Defense Counsel's Viewpoint*, 7 U.S.F.L.Rev. 217, 219 (1973), citing *Jones v. Superior Court*, 58 Cal. 2d at 59-60.

More recently, however, the California Supreme Court has virtually limited *Jones* to its facts. In *Prudhomme v. Superior Court*, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970), the court wrote:

> Our decision in *Jones* was based primarily upon our conviction that since discovery is a valuable tool for ascertaining the truth, it should be conducted along a "two-way street" in criminal as well as civil proceedings, to the extent permitted by constitutional principles. We readily acknowledge that *pretrial* disclosure would greatly facilitate the administration of criminal justice by minimizing the element of surprise, avoiding unnecessary delays and continuances, reducing inconvenience to the court, counsel, jurors and witnesses, and permitting more effective *pretrial* preparation. However, certain significant developments in the law since *Jones* was decided in 1962 caution us not to extend its holding beyond its facts without careful consideration of the possible effects which such an extension could have upon the accused's rights

10A

and privileges, and especially his fundamental right not to be compelled to be a witness against himself.

. . .

We had occasion, in *People v. Schader*, 71 Cal.2d 761, 770 [80 Cal. Rptr. 1, 457 P.2d 841], to analyze the policy which underlies the privilege against self-incrimination and recognized, ". . . with the United States Supreme Court, 'that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against the accused out of his own mouth.' (*Malloy v. Hogan* (1964) 378 U.S. 1, 7-8 . . . .) The People must 'shoulder the entire load' of their burden of proof in their *case in chief*, without assistance either from the defendant's silence or from his compelled testimony. [Citations]." (See also *Murphy v. Waterfront Com. of N.Y. Harbor*, 378 U.S. 52, 55 [12 L.Ed.2d 678, 681-682, 84 S.Ct. 1594].)

. . .

Thus, if we analyze *Jones* in the light of the policy considerations discussed in *Schader*, it is apparent that the principal element in determining whether a particular demand for discovery should be allowed is not simply whether the information sought pertains to an "affirmative defense," or whether defendant intends to introduce or rely upon the evidence at trial, but whether disclosure thereof conceivably might lighten the prosecution's burden of proving its *case in chief*. Although the prosecution should not be completely barred from *pretrial* discovery, defendant must be given the same right as an ordinary witness to show that disclosure of particular information could incriminate him.

An ordinary witness need not actually prove the existence of an incriminatory hazard as that would surrender the very protection which the privilege against self-incrimination was designed to guarantee. Instead, the privilege forbids compelled disclosures which could serve as a "link in a chain" of evidence tending to establish guilt of a criminal offense; in ruling upon a claim of privilege, the trial court must find that it clearly appears from a consideration of all the circumstances in the case that an answer to the challenged question cannot possibly have a tendency to incriminate the witness.

Id. at 323, 325, 326, 466 P.2d at ___, 85 Cal. Rptr. at ___ (footnotes and citations omitted; emphasis supplied).

The California Supreme Court is not alone in this respect. In *United States v. Fratello*, 44 F.R.D. 444, 449, 451 (S.D.N.Y. 1968), Judge Pollack concluded:

> If, therefore, the items sought from the defendants are of a class of evidence which would ordinarily be privileged from disclosure under the Fifth Amendment, the defendants ought not be required to disclose them prior to the establishment on trial of the government's *prima facie* case.
>
> . . .
>
> Until appellate guidance appears which indicates that, in the absence of special circumstances, the price sought by the prosecution for *pre-trial* disclosure of its records is not to be treated as an encroachment on the privilege, this Court is not prepared to condition discovery by the defendant under Rule 16(b) on *pre-trial* disclosure of privileged records in the possession or control of the defendant. In this connection it is noted that Courts usually accept the defendant's view of what records may be self-incriminatory.

Citations omitted; emphasis supplied.

Yet, *Prudhomme* and *Fratello* dealt with pretrial prosecutorial discovery as well as the constitutional concerns of conditioning defense discovery upon the possibility of enhancing the government's case in chief. In the instant case, of course, the discovery would have been during trial and useful only in rebuttal. Then, too, both *Prudhomme* and *Fratello* preceded *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), which upheld the constitutionality of a state's notice of alibi statute in the face of fifth amendment assault. We would, nevertheless, conclude that the fifth amendment remains relevant in the instant circumstances.

In *United States v. Wright*, 489 F.2d 1181 (D.C. Cir. 1973), the Circuit for the District of Columbia faced an analogous situation. The appellant's court-appointed counsel had employed an investigator from the Public Defender Service. The investigator interviewed potential witnesses and sent to counsel a report con-

sisting of summaries of the interviews. At trial the court ordered the investigator who had testified in behalf of the defense to turn over a copy of the report to the government. True, the order was to forward the entire report rather than to specific, relevant portions as were ordered here, but potential incrimination exists in both circumstances.

The court concluded that the principle that criminal discovery must inevitably remain basically a one-way street is firmly imbedded in our common law tradition. *Id.* at 1192. As that circuit also noted,

> There has been some attempt in recent years to increase the Government's right to discovery in criminal cases—for example, through statutes requiring the defense to give pretrial notice of the names of witnesses to be called as part of an alibi defense. But as the Supreme Court has emphasized in holding such statutes constitutional under the Fifth Amendment, they only require the defense to turn over to the Government information which the *defense intends to reveal at trial. See* Williams v. Florida, 399 U.S. 78, 85, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970).

Id. at 1194. (Emphasis added). In the instant case, the defense prior to the cross-examination of the government's witnesses surely could not have intended to reveal its own information when the witnesses may have admitted its import during cross-examination. And if the witnesses had admitted that they had made such statements as "all blacks look alike" or "I only saw him from the back" to the investigator, the government would have had the responsibility of resurrecting its witnesses' testimony by eliciting any rehabilitating statements by those same witnesses.[2]

[2]Enterprising counsel may arguably assert that the evidence doctrine of completeness, *e.g.*, Cal. Evid. Code § 356 and Proposed Federal Rules of Evidence, Court version 107, House version 106, would require disclosure. But as the comment to § 356 by the Assembly Committee on the Judiciary implies, the doctrine is not a discovery device, but rather, only permits certain relevant evidence to be admitted that would otherwise be inadmissible. The burden is on the adversary to "inquire," that is, cross-examine or rebut.

Since the Proposed Federal Rule may shift that burden, *i.e.*, the adversary may "require" admission of the entirety, it would conceivably

Since the witnesses, for whatever reasons, denied making the initial damaging statement, the defense had no alternative but to present its impeachment evidence, *i.e.*, Bond's testimony.[3] If the prosecutor doubted the validity of the contexts in which the purported statements were made as testified to by Bond, he surely had access to his own witnesses and by their testimony could have offered rebuttal to Bond's version. In summary, then, we agree with the Circuit for the District of Columbia that

> The defendant has a right under the Fifth Amendment to compel the state to investigate its own case, find its own evidence, and prove its own facts. The defense has no duty to help the prosecution convict the defendant. We therefore reject any rule which would require the defense to turn over to the prosecution prior statements of defense witnesses which could be used by the prosecution as evidence against the accused.

Id. at 1195. *See also People v. Bais*, 31 Cal. App. 3d 663 (1st Dist. 1973).

The *Wright* panel also examined that discovery order from the perspective of the Federal Rule of Criminal Procedure 16 and the Jencks Act, 18 U.S.C. § 3500,[4] as we must.

be utilized as a discovery tool. But the proposed rule only encompasses writings or recorded statements introduced into evidence, not the testimony of an individual, albeit that his recollection may be memorialized.

[3]That impeachment is the only alternative was not lost to the prosecutor. At the close of trial, he argued:

> Mr. MacIntyre: . . . Mr. Bond never testified in the trial as to anything Mr. Hoffman did or did not say to him.
>
> Mr. Hoffman, you heard his testimony, and I submit to you he denied the questions, said, "No," to the questions that were asked by Mr. Allis. If he testified any differently Mr. Bond would have testified in this courtroom to you as to what the inconsistencies were, and Mr. Bond did not so testify. You heard his testimony.

R.T. at 745, lines 6-14.

[4]The panel in *Wright* gave due consideration to the problem which could arise if a witness refreshed his recollection. (There is nothing in the record to suggest Bond used his reports to refresh his recollection.) That court considered it "hornbook rule of evidence that, had [the investigator] used parts of his report to refresh his recollection while

Before the promulgation of the original rules of criminal procedure, it was doubtful whether criminal discovery was permitted. In 1966, however, Rule 16 was liberalized toward greater discovery.

The pertinent portions of Rule 16 are as follows:

> (b) *Other Books, Papers, Documents, Tangible Objects or Places.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2) [examinations, tests, experiments], *this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government EXCEPT as provided in 18 U.S.C. § 3500.*
>
> (c) *Discovery by the Government.* If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photo-

on the witness stand, the prosecution would be entitled to examine those parts of the report and would be permitted to make use of those parts of the report in cross-examining [him]." 489 F.2d at 1188 (emphasis added). As noted by that panel, however, refreshing recollection *prior* to testifying may stand in different posture. *See* McGill v. United States, 270 F.2d 329, 331 (D.C. Cir. 1959); *see also*, Sullivan v. Superior Court, 29 Cal. App. 3d 64, 105 Cal. Rptr. 241 (1st Dist. 1972) [attorney-client privilege applicable when client previously refreshes recollection].

The Court version of Proposed Rule 612 generally permits an adversary to inspect, cross-examine from, and introduce portions of a writing used by a witness to refresh his recollection either *before or while* testifying. The House version has amended this by requiring the court in its discretion to determine that it be necessary in the interest of justice before a writing be divulged that has been used for prior refreshing of recollection.

> graph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, *this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.*

Emphasis and capitalization added.

Each subsection contains a work product[5] savings clause, *i.e.*, the italicized portions. But the government's work product is subject to an important exception, the Jencks Act, 18 U.S.C. § 3500, which provides in relevant part:

[5]To apply the work product rule to criminal law is not unusual:

> Although the . . . policies supporting protection of an attorney's work product [have been] stated with reference to civil litigation, they are even more strongly applicable in criminal proceedings. There is "an especially strong tendency toward the protection of materials as the 'work product' of an attorney in criminal cases. Thus, in relevant criminal cases (admittedly few), the courts have *consistently* held statements by witnesses . . . to be the 'work product' of an attorney." Annot., 35 A.L.R.3d 424 (1971) (footnotes omitted) (emphasis added). In State v. Montague, 101 N.J. Super. 483, 244 A.2d 699 (1968) the state sought access to the defendant's attorney's notes concerning interviews with prospective witnesses. The court states:
>
> > "[W]e are satisfied that the notes here in question represented the work product of defendant's attorney and, under the doctrine of Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), production should not have been compelled. The fears therein expressed with regard to the inviolability of an attorney's thoughts and the possibility of inefficiency, unfairness and sharp practice are equally applicable to the setting of a criminal case." 244 A.2d at 702.
>
> In re Grand Jury Proceedings, Duffy v. United States, 473 F.2d 840, 846 (8th Cir. 1973).

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

. . .

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Thus, while Rule 16 is framed in terms of *pretrial* discovery, its inclusion of the Jencks Act leads us to conclude that Rule 16 has relevance to discovery *during* trial. And specifically, defense may discover, for purposes of impeachment, statements of government witnesses who have testified. *But* no such exception is included within the terms of subsection (e). We would conclude that the work product of defense is inviolable in these circumstances.[6] *See*

[6]We may note that new proposed amendments to the Federal Rules of Criminal Procedure are pending and will be effective August 1, 1974, unless sooner stayed by Congress. It must be noted that the proposed changes include the addition of Rule 12.1, Notice of Alibi, and 12.2, Notice of Defense Based Upon Mental Condition. Also, Rule 16 has undergone revision; of particular note is the revised Rule 16(b), Disclosure of Evidence by the Defendant:

(1) Information subject to disclosure.

(A) *Documents and tangible objects.* Upon request of the government, the defendant shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) *Reports of examinations and tests.* Upon request of the government, the defendant shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(C) *Defense witnesses.* Upon request of the government, the defendant shall furnish the government a list of the names and addresses of the witnesses he intends to call in the presentation of the case in chief. When a request for discovery of the names and addresses of witnesses has been made by the government, the defendant shall be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of Rule 15.

It must be emphasized, however, that Rule 16(b)(2), Information not subject to disclosure, retains the inviolability of internal defense documents.

also, United States v. Wright, 489 F.2d 1181, 1189-90 (D.C. Cir. 1973).

Finally, the court may make brief comment upon the alleged misconduct of the prosecutor. A review of the entire transcript permits us to conclude that the prosecutor's conduct does not require reversal. In fact, the record indicates that the trial judge conducted the case most properly, and the defendants received a fair trial.

Affirmed in part, reversed in part, remanded.

KILKENNY, Concurring and Dissenting:

BROWN AND SWAIN APPEALS

I concur in the affirmances of the Brown and Swain convictions, but not for the reasons stated by the majority. It is my considered judgment that the records on these appeals are free from error.

NOBLES' APPEAL

Turning now to the Nobles' appeal, I find myself in complete disagreement with the conclusions of the majority on the issue of impeachment by the defense witness, Bond.[1] To understand the issue, it is necessary to outline in detail the events leading up to the action of the trial judge.

On direct examination, the government witness Hoffman identified Nobles as the robber standing under the surveillance camera and also identified him from a photo spread and at a police line-up prior to trial. On cross-examination, Nobles' attorney asked Hoffman, "And isn't it a fact that you told Mr. Bond that to you all the blacks appear to be alike?" Hoffman responded, "I don't believe I indicated that to him." Continuing, the attorney inquired, "You do not recall stating that to Mr. Bond?" Hoffman replied, "No, I do not." Nobles' attorney repeated, "That all blacks look alike." Hoffman responded, "No, I do not, sir." At that time, in a bench conversation outside the presence of the jury, the prosecutor requested defense counsel to furnish a copy of "any interview, notes or recorded statements of Mr. Bond—in regard to a phone call.",[2] and noted "I notice he has a copy, and I would like to have a copy of that at this time before I am able to proceed with redirect examination of the witness." Defense counsel objected. The judge indicated sympathy with the government's view and asked defense counsel to furnish authority indicating that the government was not entitled to the memorandum. After defense counsel, for the second time, rejected the demand of the prosecutor to see the document, the judge conducted a hearing and held that the prosecutor was not entitled to see the investigator's memorandum until Bond took the witness stand and impeached Hoffman's testimony in connection with the memorandum,

[1]Chief Investigator, Federal Public Defenders Association.

[2]It is conceded that the conversation was by way of phone.

and then only to the extent that any and all statements of any defendant be excised prior to the delivery to the prosecutor.[3]

Later, defense counsel called Bond. The court inquired as to the nature of Bond's testimony. Counsel responded that the witness would testify as to certain photographs and that ". . . he is going to impeach two statements of Mr. Hoffman." The court then inquired of defense counsel whether he would turn over, at the completion of Bond's testimony, the relevant portions of the document to the prosecution. Defense counsel refused. The court thereupon indicated that those portions of the testimony dealing with the impeachment would be excluded.[4] After an extended colloquy in which the judge fully explained that he would only require the defense to permit inspection of those portions of the memo-

[3]"THE COURT: . . . The Court is going to rule as follows: first of all, the government may not have the memorandum until the witness has taken the stand and has indicated the particular impeaching testimony which was the last part of Mr. Hoffman's testimony relative to his inability to distinguish between people of the black race. And if he does make such a statement, if he and Mr. Bond make such a statement, then I believe the government is entitled to an examination of the memorandum—not before that time—but after that time, after he has completed his entire testimony . . . .

"THE COURT: I will say this to assist you, Mr. Allis, while I think about it. I am sure there are no statements of any of the defendants contained in this particular memorandum, and my order is going only to this particular memorandum. I am not generalizing on any other memorandum or memoranda which you may have. It goes only to this particular memorandum involving the particular witness Hoffman. If you represent to me that there are matters contained therein, such as recitals by the defendants or your defendant, of course, I would view it imperative that you have the opportunity to excise that, perhaps after an in-camera session with the Court, or something of that nature." [R.T. 470-471].

[4]"THE COURT: Mr. Allis is an officer of the court, and [if] Mr. Bond is allowed to testify it would be necessary that those portions of Mr. Bond's investigative report which contain the statements of the impeached witness will have to be turned over to the prosecution; nothing else in that report.

"If Mr. Allis indicates to me that he refuses to do that, then I am not going to allow the particular witness to testify in that area. Now, it is entirely up to Mr. Allis as to what portion, if any, of Mr. Bond's testimony he wishes to elicit." [R.T. 520].

BEST COPY AVAILABLE

randum which dealt with the impeaching questions propounded to Hoffman, the court offered to expedite the trial by examining the report *in camera* and there excise such portions not relevant to the Hoffman impeachment. Defense counsel again rejected the court's offer with a statement of his position.[5] Defense counsel then proceeded with the examination of Bond as a defense witness, but did not ask him whether or not Hoffman had made the statement during the telephone conversation of April 6, 1973, ". . . that all blacks appear to be alike."

Obviously, the appellant is in no better position than if Bond had been called, testified that Hoffman had made the statements and on cross-examination was asked if he had made any notes at the time of the telephone conversation, responded that he had and then the prosecutor had asked for the production of the notes. If defense counsel, after a direct order from the judge, failed to produce the notes for inspection, the judge, no doubt, would have ordered the testimony stricken and the jury would have been instructed to disregard it. Here, as often happens in a well-tried case, the judge and the attorneys anticipated the problem and defense counsel was saved the embarrassment of having the testimony stricken in the presence of the jury. It may have been a good trial tactic, but I do not believe appellant is entitled to cash in on it.

The record is clear that defense counsel had the Bond statement on his desk and was utilizing it in connection with the cross-examination of Hoffman. If the trial had followed the customary course and Bond had taken the witness stand, without the preliminary discussions and the court's advisory ruling on the production of the statement, Bond, no doubt, would have said that he used the statement to refresh his memory. For that matter, the record of the proceedings necessarily points to this conclusion. Additionally, there was nothing amateurish about defense counsel's performance and it would be doing him a great injustice to

[5] "MR. ALLIS: My position at this time, your Honor, Rule 16 is that the other discovery consents in the Federal Court, that the Fourth, Fifth and Ninth Amendments protect the defendant in whose possession the reports are from turning them over for any reason.

"THE COURT: We are not talking about pretrial discovery. This is post testimony discovery. It has been carefully considered by the Court, and I am narrowing my ruling to the very specific area." [R.T. 526].

assume that he did not properly prepare the witness by having him read the memorandum. In these circumstances, the price a defendant must pay for having a witness take the witness stand, and testify contrary to declarations of another witness, is to throw open the entire subject to normal cross-examination and to make his testimony vulnerable where, otherwise, it might have been shielded. Surely, the appellant cannot claim for this witness a right which was not available to himself if he had taken the witness stand under the same circumstances.

Closely in point is *Harris v. New York*, 401 U.S. 222 (1971), where the court approved the introduction of a statement on cross-examination which could not have constitutionally been utilized on the direct examination of the defendant. There the court held that the defendant, having voluntarily taken the stand, was under an obligation to speak truthfully and accurately, and that in confronting him with his previous statement, the prosecution was doing no more than utilizing the traditional truth-testing devices of the adversary process. Here, if produced, the memorandum might show that Bond did not include the alleged material forming the basis for the impeaching questions to Hoffman. If that were true, the integrity of Bond's testimony would be severely diminished. The prosecutor, in requesting the production of the statement for cross-examination, was doing ". . . no more than utiliz[ing] the traditional truth-testing devices of the adversary process." 401 U.S. at 225. One of the most common practices employed in the art of cross-examination is to ask for the production of any notes or statements which a witness may have used to refresh his recollection.

The purpose of a trial is to develop the truth, not suppress it. We can assume that appellant's counsel was not playing games and that the memorandum probably made no reference to the impeachment questions propounded to the witness Hoffman. Otherwise, there would be no logical reason for the refusal to produce it.

My conclusions with reference to the questions propounded to Hoffman are equally applicable to the questions propounded to the witness Van Gemeren.

We are not here confronted with pretrial discovery proceedings, such as those before the court in the California cases cited by

the majority, and *United States v. Fratello*, 44 F.D.R. 444, 449, 451 (S.D. N.Y. 1968), speaking to the same type of procedure. Much more akin to our problem, as recognized by the majority, is *Williams v. Florida*, 399 U.S. 78 (1970), where a state notice of alibi statute was upheld in the face of a Fifth Amendment constitutional challenge.

United States v. Wright, 489 F.2d 1181 (CA DC 1973), is closer to the target, but is distinguishable on at least three important grounds: (1) in *Wright* the order was overly broad and required defense counsel to surrender for inspection the entire report, rather than the specific portions relevant only to the impeaching question; (2) there, the prosecutor was seeking the statement to use it as substantive evidence, rather than for impeachment purposes; and (3) *Wright* recognizes, as a Hornbook rule of evidence, that had the investigator used parts of his report to refresh his recollection, the prosecution would be entitled to examine those parts of the report relating to impeachment, and would be permitted to make use of them in the cross-examination. The opinion then goes on to emphasize that the investigator *did not* use the report to refresh his recollection. In *Wright*, there was evidently nothing in the record to warrant the court in assuming that the statement in the investigative report was used by the witness to refresh his recollection. Here, as previously mentioned, I feel that the presence of the statement on counsel table, his use of the statement in interrogating Hoffman and his lengthy colloquy with the court and opposing counsel would clearly indicate that Bond had so refreshed his recollection.

Rule 612, Proposed Federal Rules of Evidence, as submitted to the Congress by the Supreme Court, permits an adversary to inspect, cross-examine on and offer in evidence portions of a writing used by a witness to refresh his recollection either before or while testifying. The House has proposed an amendment which would require the court, in its discretion, to pass on whether the interests of justice would be served by divulging the contents of the writing. The proposed legislation is in line with the *in camera* inspection here suggested by the trial judge. In any event, it is crystal clear that the decision in *Wright* turns on the overbroadness of the order requiring the production of the report. We quote from page 1189:

23A

> "In addition, the rules governing documents used to refresh recollection could in no event justify requiring Reeves to turn over his entire investigative report to the prosecution. As a defense witness Reeves testified only as to two matters—his interview with Richardson on January 19 and his examination of the lighting conditions at the scene of the crime. Assuming they had been used to refresh his recollection at trial, those parts of his investigative report relative to this testimony and of possible use to the Government in cross-examining Reeves with respect to this testimony would have to be turned over to the prosecution."
>
> • • • • •
>
> "Even if Reeves used the report to refresh his recollection, only those parts of the report relating to his testimony on direct need have been turned over to the Government."

Here, the majority concedes that the order was stated with precision and limited to the challenged areas of impeachment.

As repeatedly stated by the trial judge, we are not here concerned with the Jencks Act, 18 U.S.C. § 3500, or with Rule 16, FRCrimP. Our problem centers on a simple common law evidentiary question of whether a witness, who was called for impeachment purposes, must produce the notes he admittedly made on the subject of impeachment.

Finding no error, I would affirm the judgment of the lower court.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 8-20-74—480

24A

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit

No. 73-2279, No. 73-2678, No. 73-2280

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

TOMMIE LOUIS BROWN; VIRGIL DAVID SWAIN; ROBERT LEE NOBLES, DEFENDANTS-APPELLANTS

D.C. No. 12113

APPEALS from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the transcript of record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed in part, reversed in part, remanded.

Filed and entered June 10, 1974.

APPENDIX C

In the United States Court of Appeals for the Ninth Circuit

No. 73-2279, No. 73-2678, No. 73-2280

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

TOMMIE LOUIS BROWN; VIRGIL DAVID SWAIN; ROBERT LEE NOBLES, DEFENDANTS-APPELLANTS

Before ELY and KILKENNY, Circuit Judges, and ENRIGHT, District Judge*

Order—Filed September 23, 1974

Judges Ely and Enright have voted to deny the Petition for Rehearing in the subject cases. Judge Ely votes to reject the suggestion for en banc rehearing, and Judge Enright recommends the rejection of such rehearing. Judge Kilkenny votes to grant panel rehearing and, alternatively, recommends the adoption of the suggestion for en banc rehearing.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

U.S. GOVERNMENT PRINTING OFFICE: 1974

BEST COPY AVAILABLE

Supreme Court, U. S.
FILED
MAR 14 1975
MICHAEL RODAK, JR.

No. 74-634

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

ANDREW L. FREY,
Deputy Solicitor General,

PAUL L. FRIEDMAN,
Assistant to the Solicitor General,

SIDNEY M. GLAZER,
IVAN MICHAEL SCHAEFFER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional provision, statute and rules involved	3
Statement	6
Summary of argument	15
Argument:	
I. The order to disclose relevant portions of the investigator's report constituted a sound exercise of the traditional, appropriate and necessary powers of the trial court over the conduct of a trial	22
A. Disclosure was necessary to facilitate cross-examination of the investigator and further the truth-seeking goal of the trial	22
B. In the absence of a recognized privilege, the trial court had discretion, as a part of its continuing responsibility to rule on matters of evidence, to order disclosure of relevant portions of the defense investigator's report	28
C. The trial court's disclosure order was consistent with the provisions of the new Federal Rules of Evidence	35

Argument—Continued Page

II. The investigator's report was not protected from disclosure by respondent's Fifth Amendment privilege against self-incrimination 44

A. Because the privilege against compulsory self-incrimination is a personal one relating to the personal knowledge and private papers of the accused, it does not extend to the investigator's report 45

B. Even if the self-incrimination privilege applied to the investigator's report, respondent was not "compelled" to disclose its contents in any constitutionally impermissible sense; rather, he would have waived whatever privilege he may otherwise have enjoyed by electing to call the investigator to the stand 48

C. The analysis of the court of appeals and the cases upon which it relied do not support its conclusion 55

III. Portions of written investigative reports reflecting statements of government witnesses interviewed by a defense investigator are not protected by Rule 16 or the Jencks Act from disclosure during trial for impeachment purposes 60

Conclusion 68

CITATIONS

Cases: Page

Bellis v. *United States*, 417 U.S. 85 ..... 45, 47, 49
Boyd v. *United States*, 116 U.S. 616 47
Brown v. *United States*, 356 U.S. 148 ..... 19, 52
Brown v. *Walker*, 161 U.S. 591 49
Campbell v. *United States*, 373 U.S. 487 30
Couch v. *United States*, 409 U.S. 322 ..... 45, 49
Dennis v. *United States*, 384 U.S. 855 23
Elkins v. *United States*, 364 U.S. 206 29
Feldman v. *United States*, 322 U.S. 487 49
Funk v. *United States*, 290 U.S. 371 66
Garrity v. *New Jersey*, 385 U.S. 493 49
Giles v. *Maryland*, 386 U.S. 66 63
Goldman v. *United States*, 316 U.S. 129 ..... 16, 30
Gordon v. *United States*, 344 U.S. 414 ..... 16, 21, 32, 63
Harris v. *New York*, 401 U.S. 222 ..... 14, 19, 48, 53, 60
Illinois v. *Somerville*, 410 U.S. 458 30
Jencks v. *United States*, 353 U.S. 657 ..... 16, 26, 30, 33, 66
Keller v. *Criminal Court of Marion County*, 16 Crim. L. Rptr. 2155 32
McGautha v. *California*, 402 U.S. 183 ..... 19, 49, 51, 52, 60
Malloy v. *Hogan*, 378 U.S. 1 49
Murphy v. *Waterfront Commission*, 378 U.S. 52 ..... 20, 58
Nardone v. *United States*, 308 U.S. 338 21
Palermo v. *United States*, 360 U.S. 343 ..... 16, 21, 29, 31, 63, 66
People v. *Damon*, 24 N.Y. 2d 256, 247 N.E. 2d 651, 299 N.Y.S. 2d 830 ..... 31, 45
People v. *Sanders*, 110 Ill. App. 2d 85, 249 N.E. 2d 124 32

Cases—Continued

	Page
Pittsburgh Plate Glass Co. v. *United States*, 360 U.S. 395	30
Prudhomme v. *Superior Court of L.A. County*, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129	19, 25, 56, 57
Raffel v. *United States*, 271 U.S. 494	19, 51-52, 53
Schmerber v. *California*, 384 U.S. 757	47
Smith v. *Illinois*, 390 U.S. 129	24
State v. *Montague*, 55 N.J. 387, 262 A.2d 398	31, 32
State v. *Montague*, 101 N.J. Super. 483, 244 A.2d 699	65
Ullman v. *United States*, 350 U.S. 422	49
United States v. *Augenblick*, 393 U.S. 348	30, 66
United States v. *Fratello*, 44 F.R.D. 444	20, 55, 56, 57
United States v. *Matthews*, D.D.C. Crim. No. 319-72, affirmed by order, C.A. D.C., No. 73-1535, March 12, 1974	28
United States v. *Nixon*, No. 73-1766, decided July 24, 1974	16, 27, 29
United States v. *Posey*, D.D.C. Crim. No. 1178-72, affirmed by order, C.A.D.C. No. 73-1379, June 14, 1974	27
United States v. *White*, 322 U.S. 694	47
United States v. *Wright*, 489 F. 2d 1181	20, 32, 33, 42, 55, 56, 58, 60
Wade v. *Hunter*, 336 U.S. 684	30
Walder v. *United States*, 347 U.S. 62	53
Wardius v. *Oregon*, 412 U.S. 474	51
Williams v. *Florida*, 399 U.S. 78	19, 23, 50, 55, 56

Constitution, statutes and rules:

	Page
United States Constitution:	
Fifth Amendment	3, 14, 17, 18, 19, 20, 44, 48, 49, 51, 54, 55, 58
18 U.S.C. 2113(a)	6
18 U.S.C. 3500 (The Jencks Act)	3, 14, 15, 20, 60, 61, 63, 64
18 U.S.C. 3500(b)	3, 63
18 U.S.C. 4208(a)(2)	7
Federal Rules of Criminal Procedure:	
Rule 16	3, 20, 21, 55, 60, 61, 63, 64, 65
Rule 16(b)	4, 62, 63, 64
Rule 16(c)	4, 14, 20, 61, 62, 64, 65
Rule 16(f)	5
Rule 17(c)	66
Rule 26	66
Federal Rules of Evidence:	
Rule 102	36
Rule 501	66
Rule 612	5, 17, 38, 41, 43
Rule 613(a)	5, 17, 36, 37
Rule 613(b)	37
Miscellaneous:	
Advisory Committee Note to Rule 613(a), Fed. R. Evid., 56 F.R.D. 278	36
Advisory Committee Note to Proposed Rule 16, Fed. R. Crim. P., 62 F.R.D. 309	64
Advisory Committee Note to Rule 16, Fed. R. Crim. P., 18 U.S.C. App., pp. 4493-4494	63, 64

Miscellaneous—Continued

	Page
Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U.L.Q. 279	23
Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966)	27
Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 Cornell L.Q. 239 (1967)	23, 24
McCormick, *Evidence* (1972):	
§ 9	41
§ 19	24
§ 33	24
§ 49	26
§ 56	38
§ 96	65
Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. Rev. 437 (1972)	63
Proposed Rules, Fed. R. Crim. P., 62 F.R.D. 305-306	64
Prosecutorial Discovery under Proposed Rule 16, 85 Harv. L. Rev. 994 (1972)	63
Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L.J. 1276 (1966)	63
S. Rep. No. 981, 85th Cong., 1st Sess.	63
VII Wigmore, *Evidence* (3d ed. 1940):	
§§ 2094-2125	38

Miscellaneous—Continued

	Page
VIII Wigmore, *Evidence* (McNaughton rev. 1961):	
§ 2276	51
1 Wright, *Federal Practice and Procedure*, § 274 (1969)	67

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-634

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 501 F. 2d 146.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1974 (Pet. App. B). On September 23, 1974, the court of appeals denied a petition for rehearing with a suggestion for rehearing *en banc*

(Pet. App. C). By order of October 15, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including November 22, 1974, on which date the petition was filed. Certiorari was granted on January 20, 1975 (App. 51). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Two government witnesses were cross-examined regarding statements allegedly made by them to an investigator employed by defense counsel, which statements were inconsistent with their identification of respondent as one of the participants in a bank robbery. They denied having made such statements. During the defense case, defense counsel proposed to call the investigator to testify to his conversations with the witnesses, with the intent of thereby impeaching the witnesses' testimony. The investigator's report, prepared after his interview of the witnesses, contained statements purporting to report or reflect what the witnesses had said to him.

The question presented is whether, in these circumstances, the trial court has discretion to condition the defendant's right to present the investigator's impeaching testimony upon production to the prosecution of the portions of the investigator's report relating to the statements purportedly made by the government witnesses to the investigator.

CONSTITUTIONAL PROVISION, STATUTE AND RULES INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

2. 18 U.S.C. 3500 (the Jencks Act) provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

3. Rule 16 of the Federal Rules of Criminal Procedure provides in pertinent part:

(b) OTHER BOOKS, PAPERS, DOCUMENTS, TANGIBLE OBJECTS OR PLACES

* * * Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

(c) DISCOVERY BY THE GOVERNMENT

If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by

prospective government or defense witnesses, to the defendant, his agents or attorneys.

* * * * *

(f) TIME OF MOTIONS

A motion under this rule may be made only within 10 days of arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

4. Rule 612 of the Federal Rules of Evidence provides:

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, either—

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any por-

tion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

5. Rule 613 of the Federal Rules of Evidence provides in pertinent part:

(a) Examining witness concerning prior statement.—In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, respondent and two others [1] were convicted of bank robbery, in violation of 18 U.S.C. 2113(a), and assault with a dangerous weapon in the commission of the robbery, in violation of 18 U.S.C. 2113(d). Each

[1] Indicted, tried, and convicted with respondent were Tommie Louis Brown and Virgil David Swain. A fourth suspect, Jonathan Ray Nobles, was also indicted but was a fugitive at the time of trial.

defendant was sentenced to a term of twenty-five years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2) (App. 48-49). Over the dissent of one judge, the court of appeals reversed respondent's conviction and ordered a new trial (Pet. App. A; 501 F. 2d 146).[2]

1. On the morning of February 6, 1973, at approximately 11:30 a.m., four men entered and robbed a branch of the Crocker National Bank in Los Angeles, California (Tr. 13-25, 185-186). One, identified as co-defendant Brown, jumped behind the tellers' windows and moved down the line of cages, collecting a total of $4,031 from the cash drawers (Tr. 18-20, 187-194). Meanwhile, brandishing weapons and guarding the customers and bank employees from various positions in the bank, the other three men ensured that no one would interfere with Brown's labors. Armed with a revolver, the man identified as respondent performed his part in the robbery while standing directly beneath the bank's automatic surveillance camera and thus was the only one of the robbers whose activities in the bank were not captured on film for the jury to view (Tr. 22-23, 192-194, 323-324).

Accordingly, the evidence against respondent at trial consisted exclusively of the testimony of two eye witnesses, Peter Van Gemeren, a bank teller (Tr. 22-23) and Gary Hoffman, a salesman visiting the bank (Tr. 323-325, 420-421). Van Gemeren testified

[2] The court unanimously affirmed the convictions of Brown and Swain.

that during the robbery he observed respondent for approximately one minute from a distance of twenty feet and that he gave a detailed description of him to the F.B.I. (Tr. 61-62). Hoffman testified that he observed respondent standing beneath the surveillance camera (App. 17; see also Tr. 416) and that he focused his attention on respondent for a full two or three minutes, one-third of the time that the robbery was in progress (App. 18-19). Hoffman also gave a description to the F.B.I. (Tr. 329). Hoffman further testified that, prior to trial, he identified respondent from a photographic array and at a police lineup (Tr. 328-331, 420-421). While respondent presented an affirmative defense of alibi, his strongest defense, as the court of appeals noted (Pet. App. 6a), was his attempt to discredit the testimony of Van Gemeren and Hoffman.

2. During his cross-examination of Van Gemeren, respondent's counsel asked the witness whether he recalled being interviewed by an investigator from the Public Defender's office, John Bond (App. 11). The witness was unsure whether such an interview had taken place and, if it had, of the nature of his response to questions that may have been asked in the interview (*ibid.*). The government thereupon requested, and respondent's counsel agreed, that the witness be allowed to examine his alleged statement for the purpose of refreshing his recollection (*ibid.*). However, the statement was not in fact shown to the witness during the overnight recess.

When the trial resumed the following morning, respondent's counsel asked Van Gemeren whether it was not a fact that he had told the defense investigator that he had seen only the back of the robber who had been standing under the surveillance camera. Van Gemeren did not recall having so stated (App. 12). Government counsel again requested that the witness be allowed to refresh his recollection by reviewing the prior statement that he allegedly had given to the investigator (*ibid.*).

Counsel for respondent then stated that he had reconsidered his previous consent to allow Van Gemeren to examine the alleged statement (App. 12-13): "I had agreed to that, Your Honor, and after saying that yesterday, I talked it over with several other attorneys in our office. It is our position that we do not have to do that because I am only trying to use this interview for impeachment purposes." The court ordered counsel to allow the witness to examine the purported statement (App. 13). Counsel then tore off a strip of paper from his investigator's report, showed it to the court,[3] and had it marked as Defense Exhibit A for identification (App. 13-14).

After Van Gemeren examined the paper, he testified that it refreshed his recollection but that he still did not recall having told the investigator that he had seen only the back of the robber standing under the

---

[3] The piece of paper was also shown to the prosecutor, who found it "unintelligible" (App. 14). It was not subsequently introduced in evidence and was not thereafter available to the prosecutor.

surveillance camera (App. 15). He further testified, in response to a question from respondent's counsel, that in fact he had not seen only the back of the robber under the camera (*ibid.*).

3. During defense counsel's cross-examination of Hoffman, the following colloquy occurred regarding a telephone conversation that Hoffman had had with the same Public Defender's office investigator, John Bond (App. 20):

> [RESPONDENT'S COUNSEL:] And isn't it a fact that you told Mr. Bond that to you all the blacks appear to be alike?
>
> [THE WITNESS:] I don't believe I indicated that to him.
>
> [RESPONDENT'S COUNSEL:] You do not recall stating that to Mr. Bond?
>
> [THE WITNESS:] No, I do not.
>
> [RESPONDENT'S COUNSEL:] That all blacks look alike?
>
> [THE WITNESS:] No, I do not, sir.

At the bench, the prosecutor requested respondent's counsel to furnish him with "a copy of any interview, notes or recorded statements" of Hoffman's purported statements to Bond for use in redirect examination of Hoffman (*ibid.*). Respondent's counsel refused to allow the prosecutor to inspect them, but the court indicated that, in the absence of legal authority precluding such inspection, it would require disclosure (App. 21):

> It seems only fair, if the government gives you copies of all the statements made. I think that the government is entitled, in view of the attempt at least of impeachment to see a copy of the statement that this witness made.

After hearing argument on the motion for production of portions of the report, the court modified its ruling. It narrowly defined the issue before it (App. 24-25), concluded that Rule 16 of the Federal Rules of Criminal Procedure applies only to pre-trial discovery and was thus inapplicable (App. 25), and then ruled as follows (App. 24, 26-27):

> * * * First of all, the Court is not going to order disclosure of this memorandum at this time. At the present time there has been no impeachment and will be no impeachment until the investigator takes the stand and testifies as to the allegedly impeaching statements.
>
> Therefore, the issue will not arise until the investigator does take the stand. The issue thereafter will be whether or not for utilization for impeachment purposes the government should be entitled to examine the memorandum made by the investigator, presumptively concurrently with his inquiry of the allegedly impeached witness for purposes of furthering the government's cross-examination.
>
> * * * * *
>
> * * * [T]he government may not have the memorandum until the witness has taken the stand and has indicated the particular impeaching testimony which was the last part of Mr.

Hoffman's testimony relative to his inability to distinguish between people of the black race.

And if he does make such a statement, if he * * * [Mr. Bond] make[s] such a statement, then I believe the government is entitled to an examination of the memorandum—not before that time—but after that time, after he has completed his entire testimony.

* * * The issue, of course, may not arise. It is dependent upon whether or not Mr. Bond is called to testify, but that is the Court's view at this time.

* * * * *

I will say this to assist you, Mr. Allis [respondent's counsel], while I think about it. I am sure there are no statements by any of the defendants contained in this particular memorandum, and my order is going only to this particular memorandum. I am not generalizing on any other memorandum or memoranda you may have.

It goes only to this particular memorandum involving the particular witness Hoffman. If you represent to me that there are matters contained therein, such as recitals by the defendants or your defendant, of course, I would view it imperative that you have the opportunity to excise that, perhaps after an in-camera session with the Court, or something of that nature.

I am specifically concerned only with the Hoffman statement of Mr. Bond.

4. As part of the defense case, counsel for respondent called John Bond as a witness, without first indicating whether he intended to comply with the

court's previous ruling regarding production of portions of Bond's investigative report (App. 29-30). When the court requested an offer of proof as to Bond's testimony, respondent's counsel stated that Bond would impeach the testimony of witnesses Van Gemeren and Hoffman (App. 30),[4] but that the defense would not turn over these witnesses' statements following Bond's direct testimony (*ibid.*). The court reiterated its prior ruling (App. 30-33) and stated that, in the absence of disclosure of the relevant portions of the investigative report, Bond would not be permitted to testify regarding his interviews with Van Gemeren and Hoffman (App. 30-31, 33, 36). Bond then testified concerning some photographs that he had taken at the bank, but, pursuant to the court's order, he was not asked to impeach the identification testimony of Hoffman or Van Gemeren (see Tr. 529-556).

5. Respondent was convicted and on appeal contended that the district court's ruling violated his privilege against self-incrimination, denied him the right of cross-examination, and was contrary to the limitations contained in Rule 16 of the Federal Rules of Criminal Procedure.

A divided court of appeals reversed. The majority found prejudicial error in conditioning impeachment upon disclosure to the prosecutor of portions of the investigative report, even though the excerpts would

---

[4] A written offer of proof was filed with the court under seal (see App. 33) and was supplemented by oral representations of defense counsel. App. 34-35.

only be used as an aid to cross-examination by the government. The court held that requiring production to the government of those portions of Bond's report relating to conversations about which Bond sought to testify during trial would violate respondent's Fifth Amendment privilege against compulsory self-incrimination (Pet. App. 9a-14a). Moreover, although the disclosure would not take place until after the government had completed its case in chief at trial, the court deemed the required production of the excerpts from the investigator's report to be a violation of Rule 16(c)'s limitation on prosecutorial discovery in criminal cases (Pet. App. 15a-18a).[5]

The dissenting judge, proceeding essentially on the premise that "[t]he purpose of a trial is to develop the truth, not suppress it" (Pet. App. 22a), concluded that there was no error in requiring a witness called for impeachment purposes to produce the notes that he made on the subject of impeachment and that form the basis of his testimony. Relying in part on *Harris* v. *New York*, 401 U.S. 222, the dissenting judge concluded that the Fifth Amendment's privilege against self-incrimination did not bar the trial court from ordering disclosure (Pet. App. 22a). He also found that the majority's reliance on Rule 16, which governs pretrial discovery, and on the Jencks Act, 18 U.S.C. 3500, was misplaced (Pet. App. 24a). "Our problem," he wrote, "centers on a simple common law evidentiary question of whether a witness, who was called for impeachment purposes, must produce the notes he admittedly made on the subject of impeachment" (*ibid.*).

[5] The court specifically held that the investigator's report was not protected by the attorney-client privilege (Pet. App. 7a-9a).

SUMMARY OF ARGUMENT

1. The trial court's order—that defense investigator Bond could not testify about alleged prior inconsistent statements of government witnesses unless the prosecution were allowed to examine the portions of the investigator's report relating to Bond's interviews of the two witnesses—was eminently sensible and fair. It was necessary and proper to advance the truth-seeking function of the criminal trial by providing the prosecution with the material most likely to be pertinent in cross-examining the witness and testing the accuracy of his recollection of the interviews. The court's order did no more than to put the prosecution on an equal footing in this particular respect with the defense, which obtains copies of statements of government witnesses under the Jencks Act (18 U.S.C. 3500) in similar situations.

As the dissenting judge said (Pet. App. 22a), "[t]he purpose of a trial is to develop the truth, not suppress it." In our legal system this goal is thought to be fostered by the adversary nature of the criminal trial itself, and particularly by the opportunity for effective cross-examination. Thus, the order of the trial court was fully consistent with the view of this Court that "[t]he need to develop all relevant facts in the adversary system is both funda-

mental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States* v. *Nixon*, No. 73-1766, decided July 24, 1974, slip op. 24.

In the absence of a recognized privilege shielding disclosure, it follows that a trial court, as a part of its continuing responsibility to rule on matters of evidence, has discretionary power during trial to order a witness or a party to produce for inspection documents in his possession relating to the subject matter of the witness's testimony at trial. See, *e.g.*, *Goldman* v. *United States*, 316 U.S. 129, 132; *Gordon* v. *United States*, 344 U.S. 414, 420; *Jencks* v. *United States*, 353 U.S. 657, 669; *Palermo* v. *United States*, 360 U.S. 343, 353. Moreover, there was no burden on the prosecution to establish in advance that Bond's report would in fact have been inconsistent with his testimony. "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness" (*Jencks* v. *United States*, *supra*, 353 U.S. at 669), as clearly it did here.

Moreover, the trial court exercised its discretion with great care by limiting its disclosure order to those portions of the investigator's report relating to the proffered testimony of Bond regarding his interviews with Van Gemeren and Hoffman, by not requiring disclosure until after Bond's direct testimony, and by indicating that the irrelevant portions

of the report could be excised prior to disclosure to the prosecution. Thus, absent the existence of a recognized privilege, it was an appropriate exercise of inherent power for the trial court to order production of the relevant portions of the investigator's report.

The trial court's disclosure order also was consistent with the provisions of the new Federal Rules of Evidence (Pub. L. 93-595), which will go into effect on July 1, 1975. Rule 613(a), by making mandatory the disclosure to opposing counsel of alleged prior statements of a witness whenever the witness is cross-examined about such statements, would have required the disclosure to the prosecutor of the purported statements of Van Gemeren and Hoffman at the time respondent's counsel interrogated them about their statements to Bond. Rule 612 would have permitted the court to require production of the relevant portions of Bond's report during or after his direct testimony, assuming that Bond had used the report to refresh his recollection before or while testifying. Thus, the adoption of the new Federal Rules of Evidence lends further support to the wisdom of the discretionary action of the trial court in this case.

2. Despite the fact that the trial court's order furthered the search for the truth, the court of appeals concluded that it violated respondent's privilege against self-incrimination. We submit, however, that the Fifth Amendment privilege does not shield the report from production in these circumstances.

The portions of the investigator's report ordered disclosed are not the kind of material within the ambit of the privilege, because they are neither personal to respondent nor testimonial in nature. Respondent did not prepare Bond's report, nor did the portions of the report ordered disclosed reflect any information from or ideas of the respondent. Moreover, while the portions of a written report relating to witness interviews might, in the abstract, be considered "testimonial" in character, they are not "testimonial" with reference to respondent—the only relevant sense in considering his claim of privilege. He neither gave the interviews nor prepared the report.

In any event, respondent was not actually compelled to produce the report and did not in fact produce it. While it is true that the court conditioned respondent's right to adduce the impeaching testimony from the investigator on production of the report, that action involved no impermissible compulsion in the Fifth Amendment sense. The court's order no doubt posed a difficult choice for respondent—either to call the investigator as a witness at trial on the condition that his report be disclosed and risk effective impeachment of his testimony,[6] or to forego the introduction of that testimony from the investigator—but the choice was respondent's freely

[6] For purposes of the Fifth Amendment analysis, it must be assumed that the report was in fact inconsistent with the testimony Bond would have given; otherwise, its disclosure would not have tended to incriminate respondent.

to make as a matter of trial strategy and did not create the kind of compulsion against which the Fifth Amendment protects. See *McGautha* v. *California*, 402 U.S. 183, 213; *Williams* v. *Florida*, 399 U.S. 78.

Moreover, even if the material in the investigator's report were otherwise within the Fifth Amendment privilege, the privilege was waived when respondent offered the investigator as a witness in his behalf. By choosing to tell his side of the story through the investigator's testimony, respondent waived his Fifth Amendment privilege not only as to the part of the story he wished the jury to hear, but as to the whole story. See *Harris* v. *New York*, 401 U.S. 222, 226; *Brown* v. *United States*, 356 U.S. 148, 155-156; *Raffel* v. *United States*, 271 U.S. 494. For one cannot "claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination." *McGautha* v. *California*, *supra*, 402 U.S. at 215.

Finally, we note that there is virtually no precedent supporting the holding of the court of appeals that the trial court's production order violated respondent's Fifth Amendment privilege. Two of the cases on which the court placed primary reliance relate to the entirely different question of pre-trial discovery, and both took pains to distinguish the situation in which the defendant elected to take the stand at trial, recognizing the need for full inquiry and thorough cross-examination in such circumstances. *Prudhomme* v. *Superior Court of L.A. County*, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr.

129; *United States* v. *Fratello*, 44 F.R.D. 444 (S.D. N.Y.). The third case, *United States* v. *Wright*, 489 F.2d 1181 (C.A.D.C.), did deal with a factual situation like that presented by this case, but its Fifth Amendment discussion was not the basis for decision.

To the extent that the Fifth Amendment was implicated in *Wright*, the court there, as here, was concerned that disclosure of an investigator's report would undermine the "preference for an accusatorial rather than an inquisitorial system of criminal justice" and the requirement that "the government in its contest with the individual * * * shoulder the entire load." *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55. However, these values are not infringed in this case, because the order of the trial court did not require production of the relevant portions of the investigator's report until after the government had put on its entire case in chief and withstood a motion for judgment of acquittal, and after the defense had called Bond as a witness and completed its direct examination of him.

3. The court of appeals also examined the district court's production order from the perspective of Rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act (18 U.S.C. 3500). Neither, we submit, has any bearing on the issue presented in this case. We do not rely upon the affirmative authorization in Rule 16(c) as a basis for the trial court's production order; indeed, we think Rule 16(c) is entirely irrelevant. The question here is not one of reciprocal discovery, and the pertinent portion of

the investigator's report did not comprise material the defendant "intends to produce at the trial." Most importantly, this case is not concerned with pre-trial discovery. Once trial has commenced the function of Rule 16 is ended; the rule neither authorizes nor precludes in-trial production or use of witnesses' statements for impeachment purposes.

As for the Jencks Act, it relates only to in-trial disclosure to the defense of statements of government witnesses, and it was intended to limit (rather than define or expand) the discretion of trial judges in ordering such disclosure. In the absence of a comparable statutory limitation upon disclosure of statements to the prosecution, final decision as to such matters remains in the sound discretion of the trial court.[7] Cf. *Gordon* v. *United States*, *supra*, 344 U.S. at 418; *Palermo* v. *United States*, *supra*, 360 U.S. at 353.

In sum, the decision of the court of appeals has improperly required the exclusion of relevant evidence essential to a fair testing of the credibility of the defense investigator's testimony. As Mr. Justice Frankfurter observed in *Nardone* v. *United States*, 308 U.S. 338, 340, "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an overriding public policy expressed in the Constitution or

---

[7] Considerations of due process might inhibit authorization of greater disclosure to the prosecution than is permitted to the defense, but no such element of inequality is involved here.

the law of the land." No such justification can be demonstrated here.

ARGUMENT

I. THE ORDER TO DISCLOSE RELEVANT PORTIONS OF THE INVESTIGATOR'S REPORT CONSTITUTED A SOUND EXERCISE OF THE TRADITIONAL, APPROPRIATE AND NECESSARY POWERS OF THE TRIAL COURT OVER THE CONDUCT OF A TRIAL.

A. Disclosure Was Necessary to Facilitate Cross-Examination of the Investigator and Further the Truth-Seeking Goal of the Trial.

Respondent's counsel asked government witnesses Van Gemeren and Hoffman, eye witnesses to the robbery, whether the former had told defense investigator Bond that he only saw the back of the robber identified by him as respondent, and whether the latter had said to Bond that all blacks looked alike to him. During this cross-examination, however, respondent's counsel refused to disclose portions of a report of the investigator containing statements of these witnesses, except for a portion of a purported statement of Van Gemeren. Thereafter, respondent's counsel sought to impeach the credibility of the two witnesses by offering testimony from Bond about the prior statements of the government witnesses.

The district court ruled that if the investigator testified about the prior statements, the government could examine that portion of the report prepared by the investigator relating to the statements made to him by the two witnesses and that the court would first examine the memorandum *in camera*, if necessary, to excise any extraneous matter. Otherwise,

the court ruled, the investigator could not testify about these alleged statements. Respondent's counsel declined to produce the report and thereby did not elicit such testimony from the investigator.

This ruling by the district court was eminently sensible and fair. The judicial process, whether in the context of a civil or a criminal case, is a search for truth and not a "sporting contest" between the two sides. See, *e.g.*, *Williams* v. *Florida*, *supra*, 399 U.S. at 82; Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U.L.Q. 279. The accomplishment of that ultimate goal is fostered by "disclosure, rather than suppression, of relevant materials" (*Dennis* v. *United States*, 384 U.S. 855, 870) and by the adversary nature of the process itself. The process contemplates examination and vigorous cross-examination in open court of the witnesses to the events in question, in an effort to enable the jury properly to weigh the credibility, demeanor, ability to recall, and opportunity to observe of the various witnesses and thereby to arrive at the truth. *See*, *e.g.*, Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 Cornell L.Q. 239, 256-257 (1967). The existence of an adequate opportunity to test the credibility of the witnesses who take the stand is in turn crucial to the reliability and success of this process.

To assist the jury in assessing credibility and in ascertaining the "whole truth," our system of justice provides for the confrontation of each witness offered—even the defendant in a criminal trial, should

he choose to testify—by opposing counsel. The witness's credibility is put to searching test under fire of cross-examination, and judges and lawyers have therefore long regarded the opportunity to cross-examine "as an essential safeguard of the accuracy and completeness of testimony." McCormick, *Evidence*, § 19, p. 43 (1972). See also *Smith* v. *Illinois*, 390 U.S. 129; Ladd, *supra*, 52 Cornell L.Q. at 258.

Because the purpose of cross-examination is to explore those factors that determine whether testimony is believable—perception, memory and narration of the witness—probably the most effective and most frequently employed method of attacking a witness's credibility is by proof that the witness on a previous occasion has made a statement inconsistent with his present testimony. McCormick, *supra*, at § 33, p. 66 and n. 1. As McCormick further states (*id.* at § 34, p. 68):

> The theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises a doubt as to the truthfulness of both statements.

It is this doubt concerning the truthfulness or accuracy of the statements made by Van Gemeren and Hoffman that respondent sought to raise by cross-examining them about their interviews with the defense investigator, Bond. Had respondent been permitted by the trial court to proceed as he intended,

he would then have attempted to reinforce the doubt thereby created by calling Bond to the witness stand and "completing the impeachment" through Bond's testimony that he had interviewed Van Gemeren and Hoffman prior to trial and that they had in fact made statements to him inconsistent with their trial testimony.[8]

Having himself thus exploited the truth-seeking devices of cross-examination and impeachment by prior inconsistent statement to create doubt about the credibility of the two key government witnesses, respondent nevertheless demands the right to deprive the government of the effective use of the same tools by denying it the opportunity to impeach his witness, Bond, with his prior inconsistent statements (if the report was inconsistent with his trial testimony) and to rehabilitate the government's own witnesses by showing that their trial testimony may not have been inconsistent with their statements to the investigator, as the defense claimed it was. The trial court prop-

---

[8] As noted (*supra*, note 4), we have not been privy to the written offer of proof concerning Bond's proffered testimony, which was filed with the court under seal. The thrust of counsel's oral representations (App. 33-34) indicates that Bond would have testified that the prior statements of Van Gemeren and Hoffman were inconsistent with their trial testimony. However, no representation was made as to whether the report would confirm that testimony, and the dissenting judge in the court of appeals inferred that it would not, stating (Pet. App. 22a) that "the memorandum probably made no reference to the impeachment questions propounded to the witness Hoffman. Otherwise, there would be no logical reason for the refusal to produce it."

erly recognized the essential unfairness of this approach (App. 21):

> It seems only fair, if the government gives you copies of all the statements made. I think that the government is entitled, in view of the attempt at least of impeachment to see a copy of the statement that this witness made.

Two observations are pertinent. First, the defense intended to open up the issue of the prior statements made by the government witnesses to its investigator while at the same time restricting the right of the government to cross-examine the defense witness effectively. Second, if the statements as recorded by Bond contained no reference to the impeaching inconsistencies about which he planned to testify, disclosure would have cast grave doubt indeed on the accuracy of the investigator's testimony that those prior inconsistent statements had actually been made to him.[9] As this Court said in *Jencks* v. *United States*, 353 U.S. 657, 667:

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is

[9] If the report conformed to the investigator's testimony, it would possibly have had some probative value in reinforcing his testimony, but it is doubtful that it would have been admissible in evidence at the behest of the defense. It would have been a prior consistent statement, and those are ordinarily inadmissible in the absence of a claim of recent fabrication or contrivance to give false testimony. See McCormick, *Evidence, supra*, § 49, p. 106.

> not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

The position of respondent and the decision of the court of appeals serve to defeat the ends of justice by allowing a partial presentation of the facts and thereby impeding the ascertainment of truth.[10] The court of appeals' opinion is thus inconsistent with the view of this Court that "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *United States* v. *Nixon*, No. 73-1766, decided July 24, 1974, slip op., p. 24.[11]

[10] This is of particular concern in light of the view advanced on at least one occasion that a defense attorney may call a witness to testify although he knows the witness will commit perjury. See Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966).

[11] While the increasing professionalism of public defender services is a beneficial development, there is no reason to suppose that defense investigators are more thorough, impartial, or accurate than law enforcement agents or that there is any less need for access to their prior reports to assess the credibility of their testimony. Without in any way impugning the motives of the investigator employed in the instant case or of defense counsel, we think it worth noting that the unreliability of defense investigators has been the subject of judicial comment by several experienced federal trial judges. For example, in *United States* v. *Posey*, D.D.C. Crim. No. 1178-72, affirmed by order, C.A.D.C. No. 73-1379, June 14, 1974, District Judge Pratt denied a request that a rape victim

B. In the Absence of a Recognized Privilege, the Trial Court Had Discretion, as a Part of Its Continuing Responsibility to Rule on Matters of Evidence, to Order Disclosure of Relevant Portions of the Defense Investigator's Report.

1. As the foregoing discussion indicates, the content of the defense investigator's report of the statements made to him by the government witnesses may well have been critical to the jury's determination of

---

who had refused to speak to a defense investigator be ordered to do so. He explained the reasons for his ruling as follows (Nov. 3, 1972, Tr. 18): "What you want to do, you want to nail her to the cross. You want to send a Public Defender investigator to interview her, take a statement, not show it to her after she's made it, then put the investigator on the stand, and what comes out of the investigator's mouth may be like nothing she has said. * * * [I]t happens over and over again."

Another case in the District of Columbia, *United States* v. *Matthews*, D.D.C. Crim. No. 319-72, affirmed by order, C.A.D.C., No. 73-1545, March 12, 1974, is strikingly similar factually to the instant case. There, defense counsel made a proffer to the court that the complainant, when interviewed by a Public Defender Service investigator, had stated (I Tr. 32-33): "All Niggers look alike." The complainant denied having made such a statement or having spoken to an investigator at all (I Tr. 31-A), and the investigator later conceded that there was no mention of such an inflammatory statement in his rough notes and that in his final written report he had used only the phrase, "They all look alike," a phrase he had failed even to place in quotation marks (I Tr. 147-148). This retreat by the investigator, after forced disclosure by the trial court of his notes and report, prompted District Judge Gesell to remark (I Tr. 33): "All of my experience has been that the investigators for the Public Defender Service are unreliable, and my only hesitancy is that I have never had one before me that was not shown to be very mistaken and inadequate in his reports, biased and lacking in the kind of requirements expected of an investigating officer."

the credibility of the eyewitness identifications of respondent as one of the robbers. At the heart of this case, therefore, is the proposition recently enunciated by this Court that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States* v. *Nixon*, *supra*, slip op. at 24. The public has a right to "every man's evidence," and exceptions to this principle "are not lightly created nor expansively construed, for they are in derogation of the search for truth" (*id.* at 25). In the absence of a recognized privilege shielding disclosure, it follows that a trial court has discretionary power during trial to order a witness or a party to produce for inspection documents in his possession relating to the subject matter of the testimony of the witness at trial.[12]

The decisions of this Court support that view. In *Palermo* v. *United States*, 360 U.S. 343, 353, for example, the Court stated: "Final decision as to production must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge * * * subject

---

[12] "Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Elkins* v. *United States*, 364 U.S. 206, 234 (Frankfurter, J., dissenting, cited with approval in *United States* v. *Nixon*, *supra*, slip op. at 25, n. 18).

to the appropriately limited review of appellate courts." See also *Campbell* v. *United States*, 373 U.S. 487, 493; *United States* v. *Augenblick*, 393 U.S. 348, 355. Thus, in the absence of a controlling statute or rule, this Court has held that the trial judge has wide discretion in matters relating to cross-examination or the production of documents to assist in cross-examination. See, *e.g.*, *Goldman* v. *United States*, 316 U.S. 129, 132; *Gordon* v. *United States*, 344 U.S. 414, 420; *Jencks* v. *United States*, 353 U.S. 657, 669; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400.

While the cited cases were decided in the context of defense requests for government documents or defense cross-examination of a government witness, there is no sound reason why the same principles should not be equally applicable to the right of the government to obtain disclosure for purposes of possible cross-examination (unless production of the document requested is shielded by a privilege or is barred by statute or rule, matters that we discuss in subsequent parts of this brief). What is at stake in considering the prosecution's right to reciprocal production is the vitally important "public's interest in fair trials designed to end in just judgments." *Illinois* v. *Somerville*, 410 U.S. 458, 463, quoting *Wade* v. *Hunter*, 336 U.S. 684, 689.[13]

---

[13] While the core issue is one of reciprocity, it should be noted that our position here may be upheld without ruling that the prosecution has a right of disclosure of prior statements of defense witnesses as broad in all respects as that accorded the defense under the Jencks Act (which itself represented a *narrowing* of the traditional inherent powers of trial courts, see *Palermo* v. *United States*, *supra*, 360 U.S. at 361 (Brennan, J., concurring)). The trial court did not order full disclosure of Bond's prior statement, but confined its order to the portion concerning Bond's account of the prior statements of the prosecution witness. This is relatively a special and narrow instance in which disclosure was particularly essential.

Three state courts have had occasion to consider the question of reciprocity. As the Supreme Court of New Jersey observed in *State* v. *Montague*, 55 N.J. 387, 398-399, 262 A.2d 398, 403-404:

> We noted that cross-examination was the most valuable safeguard that had been discovered in the judicial search for truth and that, if cross-examination is to be effective, it must have wide latitude in the testing of the recollection of the witness. * * * While this was said in connection with the testimony of a prosecution witness it applies equally to the testimony of a defense witness. So long as no constitutional privilege is infringed, there is no sensible reason for imposing any restrictions on the cross-examination of defense witnesses beyond those applied to prosecution witnesses. We find no infringement whatever here, for * * * nothing in the Constitution assures to a defendant "a right so to defend as to deny the State a chance to check the truth of his position." * * *

Accord: *People* v. *Damon*, 24 N.Y. 2d 256, 261, 247 N.E. 2d 651, 654, 299 N.Y.S. 2d 830, 834;

People v. *Sanders*, 110 Ill. App. 2d 85, 89, 249 N.E. 2d 124, 126 (1st Dist.).[14]

2. The trial judge is limited in the exercise of his discretion to order production only by the traditional doctrines of relevance and materiality. See *Gordon* v. *United States*, *supra*, 344 U.S. at 420. "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness."

[14] The court in *Montague* noted that applicable court rules contained nothing explicit with respect to the right of the prosecution to obtain production of a prior statement of a defense witness who has actually testified. Its decision rested instead upon "the court's inherent power to order discovery when justice so requires." 55 N.J. at 400, 262 A.2d at 405.

So far as our research discloses, the three cited cases are the only decisions of state appellate courts that have considered the question at issue here. Each of them concluded that, so long as there is no common law or constitutional privilege precluding disclosure of statements of witnesses in the possession of the defense (and each found none), the trial court has inherent authority to order their disclosure. Cf. *Keller* v. *Criminal Court of Marion County*, 16 Crim. L. Rptr. 2155 (Indiana Sup. Ct., October 15, 1974). Indeed, all three of these cases actually go further than the present case, since the disclosure required was not confined to the portion of prior defense witness statements concerning interviews of government witnesses.

The only reported federal decision we know of dealing directly with this issue, besides that of the court of appeals in the instant case, is *United States* v. *Wright*, 489 F.2d 1181 (C.A.D.C.), in which a divided panel of the District of Columbia Circuit held, as did the court below, that it was error for the trial court to have ordered disclosure of an investigator's report.

Jencks v. *United States*, *supra*, 353 U.S. at 669. In deed, depending upon the care and completeness with which it was prepared, the portion of the report that the court ordered disclosed could have turned out to be the weightiest evidence available for assessing the relative credibility of Van Gemeren, Hoffman and Bond; surely, at the time of trial, it was likely to be better evidence than Bond's recollection of what was said at interviews weeks earlier. If the reports were inconsistent with Bond's testimony, the jury should not have been deprived of such highly probative evidence.

Here, the trial court exercised its discretion with care. It limited its disclosure order to those portions of the investigator's report that related to the direct testimony Bond would have given regarding his interviews with Van Gemeren and Hoffman; it indicated that counsel could excise any statements of the defendant before delivering the other relevant portions of the report to the prosecutor; it did not require disclosure until after Bond's direct testimony; and it made clear that its ruling was limited to "the very specific area" of "post testimony discovery" and had nothing whatsoever to do with pretrial discovery (App. 33).[15]

[15] While we believe *United States* v. *Wright*, *supra*, was wrongly decided by the District of Columbia Circuit with respect to this issue, it is significantly distinguishable from the case at bar, for the trial judge in *Wright* did not exercise his discretion with the care shown by the trial judge in the

In sum, the court's disclosure order was limited to that which was relevant and material to the purpose for which respondent chose to call the investigator as a witness, that purpose being the impeachment of two government witnesses by alleged prior inconsistent statements.[16] Absent the existence of a

---

instant case. As the dissenting court of appeals judge stated in this case (Pet. App. 23a; emphasis in original):

> (1) [I]n *Wright* the order was overly broad and required defense counsel to surrender for inspection the entire report, rather than the specific portions relevant only to the impeaching question; (2) there, the prosecutor was seeking the statement to use it as substantive evidence, rather than for impeachment purposes; and (3) *Wright* recognizes, as a Hornbook rule of evidence, that had the investigator used parts of his report to refresh his recollection, the prosecution would be entitled to examine those parts of the report relating to impeachment, and would be permitted to make use of them in the cross-examination. The opinion then goes on to emphasize that the investigator *did not* use the report to refresh his recollection. * * * Here, as previously mentioned, I feel that the presence of the statement on counsel table, his use of the statement in interrogating Hoffman and his lengthy colloquy with the court and opposing counsel would clearly indicate that Bond had so refreshed his recollection.

[16] Consideration of the kind of cross-examination to which investigator Bond could properly have been subjected shows that the trial judge had discretion to order production of the report. Specifically, testimony by Bond that Hoffman and Van Gemeren made statements to him subjected Bond to cross-examination as to all the details and circumstances under which these statements were made; the context in which the quoted statements were made; how he remembered these particular statements, especially since he obtained them as

recognized privilege shielding the report, the trial court properly exercised its discretion in ruling that the memorandum of the defense investigator should be disclosed to the prosecutor if the investigator testified about the prior statements of the two key government witnesses.

C. The Trial Court's Disclosure Order was Consistent with the Provisions of the New Federal Rules of Evidence.

1. Rule 613(a) of the Federal Rules of Evidence [17] provides:

> In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request *the same shall be shown or disclosed to opposing counsel.* [Emphasis supplied.]

---

part of his job as a professional investigator; the form in which he recorded these statements; and whether he had ever refreshed his memory about these statements from looking at his report.

[17] The Federal Rules of Evidence (Pub. L. 93-595) were signed into law by President Ford on January 2, 1975, and are scheduled to take effect 180 days later, on July 1, 1975. They will apply to all proceedings brought after their effective date, as well as "to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply." Pub. L. 93-595. Thus, if there were to be a new trial in the instant case, the new rules would govern unless the trial is held before July 1 of this year.

By its terms, Rule 613(a) makes mandatory the disclosure to opposing counsel (in this case, the prosecutor) of prior statements made by a witness whenever the attorney examining the witness (here, defense counsel) asks the witness about his prior statements. The purpose of the Rule is to "protect against unwarranted insinuations that a statement has been made when the fact is to the contrary." Advisory Committee Note to Rule 613(a), Fed. R. Evid., 56 F.R.D. at 278. The rule is consonant with the overall purposes of the new Federal Rules of Evidence as articulated by this Court and by Congress: "These rules shall be construed to secure fairness in administration, * * * and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102.

The Rule would require disclosure of the relevant portions of the investigator's report. Respondent's counsel asked Van Gemeren and Hoffman on cross-examination whether the former had told Bond that he only saw the back of the robber identified as respondent and whether the latter had stated that all blacks looked alike. During the testimony of the witnesses, however, respondent's counsel refused to disclose the report prepared by the investigator and purportedly containing prior statements of these witnesses to him.[18] Under Rule 613(a), such refusal

[18] Respondent's counsel initially did make available a portion of a purported statement of Van Gemeren (Defense Exhibit A for identification), but it is unclear from the record whether this disclosure would have been sufficient to satisfy the requirement of Rule 613(a). No disclosure of any kind was made with respect to Hoffman's alleged statement.

would not have been permitted once the question about their prior statements had been asked of government witnesses. (Moreover, Rule 613(b) makes clear that such questioning was a necessary predicate to introduction of extrinsic evidence regarding alleged prior statements of the witnesses.)

Once respondent's counsel had asked Van Gemeren or Hoffman about their statements to Bond, under the new Rule the purported statements necessarily would have had to be "shown or disclosed" to the prosecutor, in order to protect against "unwarranted insinuations" that the statement had been made when the fact may have been to the contrary.[19] The order of the trial court thus reflected the very concerns expressed by the Court and Congress in promulgating Rule 613(a), and the adoption of the Rule lends

[19] Because the witnesses had apparently never read, approved, signed, or adopted Bond's reduction to writing of their statements to him (App. 13-14) it is doubtful that the "statements" would themselves have been admissible as extrinsic evidence of prior inconsistency on the part of Van Gemeren and Hoffman. But the fact that they were not statements of the government witnesses for admissibility purposes is not pertinent to the right of disclosure afforded by Rule 613(a), which is designed to permit opposing counsel to inform and satisfy himself of the basis for undertaking the impeachment.

The statements, if inconsistent with Bond's testimony, would have been admissible as *his* prior statement, but that use does not implicate Rule 613.

further support to the wisdom of the discretionary action of the trial court in this case. See also Rule 106, Fed. R. Evid.[20]

2. Rule 612 of the Federal Rules of Evidence provides in pertinent part:

> Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, either—
>
> (1) while testifying, or

[20] The evidentiary doctrine of completeness, expressed in Rule 106, dictates that all evidence relating to a given document be made available once that document is used by one of the parties. Rule 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Complete disclosure is favored because the courts have recognized the danger of removing evidence from context and thereby creating a possibly distorted impression as to what the evidence actually reveals. See VII Wigmore, *Evidence*, §§ 2094-2125, p. 466 (3d ed. 1940); McCormick, *Evidence, supra*, § 56, p. 130. Once a part of a statement has been introduced, the adversary has an opportunity to introduce the remainder of the document or testimony, insofar as it is relevant to the subject matter and tends to explain the earlier offered testimony. The policy behind the completeness principle does not differ with reference to documents referred to but not produced at trial. The entire reason for the doctrine is the fair administration of justice, which can only be assured where there is full disclosure. Once Bond testified concerning what was said during the Hoffman and Van Gemeren interviews, the prosecution would have been entitled to verify the content of the statements or offer the balance of the statements into evidence.

> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
>
> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. * * *

This new Rule thus incorporates the Jencks Act's production rationale and recognizes it as a two-way street, making prior statements available to the opposing party for purposes of cross-examination after the direct examination of the witness. The Advisory Committee's Note demonstrates the Rule's intended application to a situation such as that presented in the instant case (56 F.R.D. at 277):

> The purpose of the rule is the same as that of the *Jencks* statute, 18 U.S.C. § 3500: *to promote the search of credibility and memory.* The same sensitivity to disclosure of government files may be involved; hence the rule is expressly made subject to the statute * * *. With this limitation in mind, some differences of application may be noted. The Jencks statute applies only to statements of witnesses; the rule is not so limited. The statute applies only to criminal cases; the rule applies to all cases. *The statute applies only to government witnesses; the rule applies*

to all witnesses. The statute contains no requirement that the statement be consulted for purpose of refreshment before or while testifying; the rule so requires. Since many writings would qualify under either statute or rule, a substantial overlap exists, but the identity of procedures make this of no importance. [Emphasis supplied and citations omitted.]

This Rule would have required production at trial, for purposes of cross-examination of Bond, of the relevant portions of Bond's notes, assuming that Bond had used the notes to refresh his recollection. Respondent's counsel sought to impeach the credibility of Van Gemeren and Hoffman by offering Bond's testimony about prior statements purportedly made to him by those witnesses and recorded by him in a written report.[21] The district court ruled that if the investigator testified about prior statements, the

[21] The fact that the alleged prior statements were included in Bond's written report is not in dispute, as the following colloquy indicates (App. 35):

> THE COURT. For the record, your offer of proof, does it include the fact that Mr. Bond did in this particular case, with these two witnesses, prepare notes during the time he made his interview with these witnesses and then subsequently reduced them to a written report; is that correct, Mr. Allis?
>
> MR. ALLIS. That is correct. It is not in the offer of proof but that is what he did.
>
> THE COURT. And that, of course, is what we have been talking about when we were talking about a portion of the report being turned over to the government after the completion of Mr. Bond's testimony, I assume.

government could inspect that portion of the investigator's report relating to the statements made to him by the witnesses (after the court had first examined the memorandum, *in camera* if necessary, to excise any extraneous matter). Otherwise, the court ruled, the investigator could not testify about these alleged statements.

Because respondent did not produce the report and was thus not permitted to elicit such testimony from the investigator, we do not know whether Bond would have found it necessary to refresh his recollection while testifying. Had he done so, of course, the prosecutor would have been entitled to inspect the report, both under Rule 612 (if the case had been tried after the effective date of the Federal Rules of Evidence) and under traditional rules of evidence. See *e.g.*, McCormick, *Evidence*, *supra*, § 9, pp. 17-18;[22] *United*

[22] McCormick has explained the purpose of this evidentiary rule as follows (*ibid.*):

> The second safeguard is the rule which entitles the adverse party, when the witness seeks to resort to the memorandum, to inspect the memorandum so that he may object to its use if ground appears, and to have the memorandum available for his reference in cross-examining the witness. With the memorandum before him, the cross-examiner has a good opportunity to test the credibility of the witness's claim that his memory has been revived, and to search out any discrepancies between the writing and the testimony. This right to demand inspection has usually been limited to writings used by the witness on the stand, but the reasons seem equally applicable to writings used by the witness to refresh his memory before he testifies. Doubtless the courts have thought that to require inspection of such papers may

States v. *Wright*, 489 F. 2d 1181, 1188-1189 (C.A. D.C.). If Bond refreshed his recollection by reviewing his report *before* testifying, it would have been in the court's discretion under Rule 612 to order production. While the court of appeals here stated that there "is nothing in the record to suggest Bond used his reports to refresh his recollection" (Pet. App. 14a, n. 4), there is nothing to suggest that he had not done so. Indeed, as the dissenting judge stated, the fair inference is that Bond did in fact refresh his recollection by reviewing his report (Pet. App. 21a-22a):

> The record is clear that defense counsel had the Bond statement on his desk and was utilizing it in connection with the cross-examination of Hoffman. If the trial had followed the customary course and Bond had taken the witness stand, without the preliminary discussions and the court's advisory ruling on the production of the statement, Bond, no doubt, would have said that he used the statement to refresh his memory. For that matter, the record of the proceedings necessarily points to this conclusion. Additionally, there was nothing amateurish about defense counsel's performance and it would be doing him a great injustice to assume that he did not properly prepare the witness by having him read the memorandum.

---

unduly encourage prying into the opponent's file, but increasingly, the decisions reflect the view that there is a public interest in the full disclosure of the source of a witness's testimony. [Footnotes omitted.]

From the record in this case, it is fair to assume that had Bond testified about his interviews with Van Gemeren and Hoffman, the prosecutor in cross-examination would have asked Bond whether he had refreshed his recollection by reviewing his report before testifying. If Bond responded that he had, the relevant portions of the report would have been producible under Rule 612 in the discretion of the court, and the district court undoubtedly would have exercised its discretion under the Rule to order production "in the interests of justice" (just as it did here in the exercise of its inherent discretion absent a rule or statute). Thus the prosecutor would have been permitted to inspect the report, to cross-examine the witness about it, and to introduce in evidence those portions relating to Bond's testimony.[23]

---

[23] It is, of course, theoretically possible that Bond never examined the report to refresh his recollection and would have testified without ever doing so. As a professional investigator who interviews large numbers of persons for a busy public defender's office, it seems unlikely that Bond would be able to give reliable testimony without reviewing his report, which was prepared several weeks and, presumably, many interviews before the time of trial. In any event, it seems hard to imagine any legitimate purpose that could be served by a deliberate refusal of a defense investigator to refresh his recollection from his report prior to testifying, and, in an appropriate case, we think a trial court might have inherent power to demand that the investigator refresh his recollection as a precondition to testifying.

Moreover, while Rule 612 itself would not specifically authorize production of prior written statements not used to refresh recollection, it is by no means clear that it was intended to extinguish the court's inherent power, apart from

II. THE INVESTIGATOR'S REPORT WAS NOT PROTECTED FROM DISCLOSURE BY RESPONDENT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The court of appeals concluded that the trial court's order requiring disclosure of relevant portions of the defense investigator's report as a condition of Bond's testifying about his interviews with Van Gemeren and Hoffman violated respondent's Fifth Amendment privilege against compelled self-incrimination. The precise analytical basis for the court's decision is not clear, and the opinion does not adduce any substantial body of precedent supporting the conclusion it reached, either directly or by analogy.

The Fifth Amendment privilege against self-incrimination does not sustain the court's result. The portions of the investigator's report ordered disclosed are not the kind of material within the ambit of the privilege, being neither personal to the defendant nor testimonial in nature. Moreover, because the court's order did not require any disclosure unless and until respondent himself chose to call the investigator as a witness, it involved no compulsion in the Fifth Amendment sense. Finally, even if the material were otherwise within the privilege, the privilege was waived when the defense elected to seek to prove the making of prior inconsistent statements by offering the investigator as a witness.

---

specific enabling rule, to require production in particular cases, such as this, in which the statement is manifestly likely to have great materiality in assessing the credibility of the witness's trial testimony.

A. Because The Privilege Against Compulsory Self-Incrimination is a Personal One Relating To The Personal Knowledge and Private Papers Of The Accused, It Does Not Extend To The Investigator's Report.

By investing Bond's reports describing his interviews of government witnesses with the status of materials protected by respondent's privilege against compulsory self-incrimination, the court of appeals overlooked the essential attributes that must exist in order for such protection to be properly recognized. "By its very nature, the privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." *Couch* v. *United States*, 409 U.S. 322, 327. "It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him." *Id.* at 328 (emphasis in original). See also *Bellis* v. *United States*, 417 U.S. 85, 90.

Respondent did not prepare Bond's report, nor is it suggested that the portions ordered disclosed in any way reflected information or ideas of the respondent. There was, in short, nothing personal to respondent in this material, and compelled its disclosure thus would not infringe his privilege. As the New York Court of Appeals stated in upholding a similar disclosure requirement in *People* v. *Damon*, *supra*, 24 N.Y. 2d at 261, 247 N.E. 2d at 654, 299 N.Y.S. 2d at 834:

These statements were not those of the defendant but of witnesses offered by the defendant. In no sense can it be said that he is being compelled to produce incriminating statements of his own. The privilege against self incrimination applies only to evidence of a testimonial or communicative nature obtained from the defendant himself (*Schmerber* v. *California*, 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908; see, also, *Jones* v. *Superior Ct. of Nevada County*, 58 Cal. 2d 56, 22 Cal. Rptr. 879, 372 P.2d 919, 96 A.L.R. 2d 1213; Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L. Rev. 228, 246 n.; Note, 76 Harv. L. Rev. 838). We have recognized the defendant's right to obtain and inspect statements of prosecution witnesses for possible use in cross-examining them (see *People* v. *Rosario*, 9 N.Y.2d 286, 213 N.Y.S. 2d 448, 173 N.E. 2d 881, 7 A.L.R.3d 174). There is neither reason nor justification for not allowing the People to procure from the defendant statements taken from his witnesses for the same purpose of cross-examining them. [Footnote omitted.]

The report does not become personal in the constitutional sense simply because it was prepared by respondent's agents for purposes of his trial or because it was in the physical possession of his agents at the time of trial. The content and character of the material involved is still the analytic touchstone. "The distinction which has emerged * * * is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical

evidence' does not violate it." *Schmerber* v. *California*, 384 U.S. 757, 764.

It might be argued that the matter in question here —portions of a written report relating to witness interviews—is "testimonial" in character and thus is protected under the *Schmerber* distinction. While this contention might have substance as applied to a claim of privilege by Bond, the report cannot be considered "testimonial" in connection with respondent's claim. At the time this Court first held that the privilege could attach to documents as well as to oral testimony, it referred to "forcible and compulsory extortion of a man's own testimony or of his *private* papers to be used as evidence to convict him of crime * * *." *Boyd* v. *United States*, 116 U.S. 616, 630 (emphasis supplied). See also *United States* v. *White*, 322 U.S. 694, 698 ("The constitutional privilege against self-incrimination * * * is designed to prevent the use of legal process * * * to force [the accused] to produce and authenticate any *personal* documents or effects that might incriminate him.") (emphasis supplied); *Bellis* v. *United States*, *supra*.

For purposes of evaluating respondent's claim of privilege, the investigator's written report is not materially different from a tape recording of the interviews or from purely physical evidence that may have been uncovered by Bond in the course of the investigation. Not being personal to respondent or "testimonial" from him, it is not cloaked with the protection afforded by his privilege against self-incrimination.

B. Even If the Self-Incrimination Privilege Applied To The Investigator's Report, Respondent Was Not "Compelled" To Disclose Its Contents In Any Constitutionally Impermissible Sense; Rather, He Would Have Waived Whatever Privilege He May Otherwise Have Enjoyed By Electing To Call The Investigator To The Stand.

Even if Bond's reports of his interviews of Van Gemeren and Hoffman, although in no sense personal to respondent, were considered to fall within the scope of his compulsory self-incrimination privilege, the trial court's order conditioning Bond's testimony regarding those interviews on disclosure of the pertinent portions of the reports did not impermissibly infringe on the privilege. The reports were not available to the prosecution for use during its case in chief or, indeed, at any time thereafter, save if respondent himself elected to seek to prove prior inconsistent statements of the government witnesses by putting Bond on the stand to testify thereto.

1. The command of the Fifth Amendment is that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself * * *." Although the privilege against self-incrimination thus protects against compelled testimony, it does not allow a defendant who chooses to testify in a criminal trial to shield his own testimony, or that of one of the witnesses whom he calls to testify in his behalf, against the "traditional truth-testing devices of the adversary process" (*Harris* v. *New York*, 401 U.S. 222, 225-226), including the risk of confrontation with prior inconsistent statements. This consequence has never

been considered to be "extortion of information from the accused himself that offends our sense of justice." *Couch* v. *United States*, *supra*, 409 U.S. at 328; see also *Bellis* v. *United States*, *supra*, 417 U.S. at 91; *Malloy* v. *Hogan*, 378 U.S. 1, 8; *Ullman* v. *United States*, 350 U.S. 422, 428; *Brown* v. *Walker*, 161 U.S. 591, 600; *Feldman* v. *United States*, 322 U.S. 487, 500 (Black, J., dissenting).

Accordingly, it was proper for the trial court to condition presentation of Bond's testimony upon disclosure of the pertinent portions of the report. The trial court's order may have had adverse consequences for respondent in the presentation of his case, but the primary consequence was nothing more than a strategic choice whether to offer the investigator's testimony at trial, on the condition that his report be disclosed, or to forego the introduction of such testimony. This consequence does not amount to "compulsion" in the sense relevant for bringing the protection of the self-incrimination provision into play. Cf. *McGautha* v. *California*, 402 U.S. 183, 213.

While the order of the trial court posed a choice for respondent—perhaps even a difficult choice—the choice was his freely to make as a matter of trial strategy; the court's order did not create the kind of compulsion "likely to exert such pressure upon an individual as to disable him from making a free and rational choice" (*Garrity* v. *New Jersey*, 385 U.S. 493, 497), and therefore does not implicate the Fifth Amendment. As this Court stated in *McGautha* v. *California*, 402 U.S. 183, 213, in upholding the va-

lidity of a unitary trial procedure in a capital case, under which the defendant could not testify in mitigation of punishment without exposing himself to questioning on the issue of guilt or innocence:

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. *McMann* v. *Richardson*, 397 U.S., at 769. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.

Equally pertinent is *Williams* v. *Florida*, 399 U.S. 78, in which the Court upheld a notice-of-alibi rule that conditioned the accused's right to put on an alibi defense on pretrial disclosure of the names of alibi witnesses. In rejecting the assertion that this rule impermissibly burdened the exercise of the privilege against compulsory self-incrimination, the Court stated (399 U.S. at 83-84):

> The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. That

> the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.

Cf. *Wardius* v. *Oregon*, 412 U.S. 470, 474.

In the present case, accordingly, there was no infringement of the privilege when respondent voluntarily elected not to disclose the investigator's report.

2. Another side of the same coin is the recognized principle that a defendant who elects to take the stand or raise a particular matter in his defense places himself in a fundamentally different position from one who does not. He subjects himself to a requirement of completeness. Once on the witness stand, for example, the defendant is subject like any other witness to cross-examination designed to assure the reliability of his testimony. By choosing to tell his side of the story to the jury, he waives his Fifth Amendment privilege not only as to the part of the story that he wishes the jury to hear, but as to the *whole* story.

"[A] defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination." *McGautha* v. *California*, *supra*, 402 U.S. at 215. See also VIII Wigmore, *Evidence* § 2276, p. 459 (McNaughton rev. 1961). "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." *Raffel* v. *United*

States, 271 U.S. 494, 497. And, "[i]t is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination." *McGautha* v. *California*, *supra*, 402 U.S. at 215.

The underlying rationale for these principles was set forth in Mr. Justice Frankfurter's opinion for the Court in *Brown* v. *United States*, 356 U.S. 148, 155-156:

> * * * [W]hen a witness voluntarily testifies, the privilege against self-incrimination is amply respected without need of accepting testimony freed from the antiseptic test of the adversary process. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell. * * * The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination. * * *

In sum, "[t]he safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Raffel* v. *United States*, *supra*, 271 U.S. at 499. The privilege "cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris* v. *New York*, *supra*, 401 U.S. at 226; see also *Walder* v. *United States*, 347 U.S. 62, 65.

These established principles apply with even greater force to a witness offered on behalf of a defendant than they do to the accused himself, for an accused can have no greater right to shield a witness whom he calls from cross-examination by invoking his personal privilege than he has to shield his own testimony. Moreover, there is sound policy in requiring a defendant who offers a witness—whether himself or another testifying in his behalf—to do so without reservation and in allowing the prosecution to probe all seemingly questionable aspects relevant to the witness's testimony, including through the production of interviews or reports prepared by the witness.

Whether the defendant takes the stand himself or has another give testimony on his behalf, he benefits from the opportunity to tell the jury his side of the story. The fair balance of advantages requires

that the jury have an opportunity to hear the entire story—including the cross-examination of the witness based on any of his prior interviews or reports. As the dissenting judge stated in this case (Pet. App. 22a):

> * * * In these circumstances, the price a defendant must pay for having a witness take the witness stand, and testify contrary to declarations of another witness, is to throw open the entire subject to normal cross-examination and to make his testimony vulnerable where, otherwise, it might have been shielded. Surely, the appellant cannot claim for this witness a right which was not available to himself if he had taken the witness stand under the same circumstances.

Finally, the Fifth Amendment privilege is available only with respect to material that may tend to incriminate. In the context of the narrow disclosure that would have been required in the instant case, the possibility of incrimination—insofar as we can imagine without having seen the report—could arise only to the extent that Bond's report would be inconsistent with his testimony. Since the privilege is applicable, if at all, only to the extent that the written report of the interviews conflicts with the oral testimony, the need for adherence to the principle of waiver and the requirement of completeness, discussed above, are brought into clear focus.

C. The Analysis Of The Court Of Appeals And The Cases Upon Which It Relied Do Not Support Its Conclusion.

The court of appeals began its discussion of the privilege against self-incrimination by noting that in 1966 Justices Black and Douglas had dissented from the promulgation by the Court of amendments to Rule 16 of the Federal Rules of Criminal Procedure because of concern about their possible conflict with the Fifth Amendment privilege (Pet. App. 9a). It then proceeded to a discussion of the opinions of the California Supreme Court in *Prudhomme* v. *Superior Court*, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129, and of Judge Pollack in *United States* v. *Fratello*, 44 F.R.D. 444 (S.D.N.Y.). While acknowledging that both cases dealt with pretrial discovery and concerned "conditioning defense discovery upon the possibility of enhancing the government's case in chief" (Pet. App. 12a), and that the decisions antedated this Court's opinion in *Williams* v. *Florida*, 399 U.S. 78, the court of appeals "nevertheless, conclude[d] that the fifth amendment remains relevant in the instant circumstances" (Pet. App. 12a).

On this premise, it then considered the opinion of the District of Columbia Circuit in *United States* v. *Wright*, *supra*, referred approvingly to that court's concept that "criminal discovery must inevitably remain basically a one-way street" (Pet. App. 13a), and concluded by announcing its agreement with the following language from the *Wright* opinion (Pet. App. 14a):

> The defendant has a right under the Fifth Amendment to compel the state to investigate its own case, find its own evidence, and prove its own facts. The defense has no duty to help the prosecution convict the defendant. We therefore reject any rule which would require the defense to turn over to the prosecution prior statements of defense witnesses which could be used by the prosecution against the accused. [*United States* v. *Wright*, *supra*, 489 F.2d at 1195.]

None of these authorities fairly supports the result in the instant case.

1. Rule 16 involves provisions for pretrial discovery of certain materials that the defense intends to rely upon at trial. The concerns voiced by Justices Black and Douglas in the statements quoted by the court of appeals have largely been dissipated by the decision in *Williams* v. *Florida*, *supra*, upholding the "notice of alibi" requirement. See also *Wardius* v. *Oregon*, *supra*.

Moreover, it does make a material difference that the concern upon which those Justices focused and that prompted the decisions in *Prudhomme* and *Fratello* was pretrial discovery and not in-trial disclosure. The prosecution's pretrial discovery requests were deemed improper in *Prudhomme* because disclosure at that time "might lighten the prosecution's burden of proving its case in chief" (2 Cal. 3d at 326, 466 P. 2d at 677, 85 Cal. Rptr. at 133), and "might serve as a link in a chain of evidence tending to establish [the defendant's] guilt of a criminal offense" (2 Cal. 3d at 327, 466 P. 2d at 677-678, 85 Cal. Rptr. at 133-134), and in *Fratello* because "the documents sought from the defendants are required by the government as a part of its prima facie case" (44 F.R.D. at 449). Both cases took pains to distinguish the situation in which the defendant elected to take the stand at trial and open up a subject, recognizing the need for full inquiry and thorough cross-examination in such circumstances (2 Cal. 3d at 325, 466 P. 2d at 676, 85 Cal. Rptr. at 132; 44 F.R.D. at 448).

The inapplicability of *Prudhomme* and *Fratello* to the problem presented in this case is apparent. We are not here concerned with pretrial discovery of evidence the defense intends to offer at trial, nor are we concerned with disclosure of evidence by the defense before the government has made out a prima facie case. The issue is the right of the government to inspect relevant portions of a defense investigator's report after the government has put in its entire case in chief and has withstood a motion for judgment of acquittal and after the accused has voluntarily elected to offer the investigator as a witness in his defense. At that point, disclosure of the report can hardly be said "to lighten the prosecution's burden of proving its case in chief" or to serve as a "link in a chain of evidence tending to establish * * * guilt."

Rather, as when the defendant himself chooses to testify (a situation recognized by the courts in *Prudhomme* and *Fratello* as entirely different from dis-

closure before trial), the decision to offer a witness in one's behalf subjects that witness to cross-examination about relevant matters. It would be unfair to allow him to testify without being cross-examined, and it cannot be argued on the basis of *Prudhomme* and *Fratello* that disclosure of his report at that point is an improper impingement on his Fifth Amendment privilege.

2. Unlike *Prudhomme* and *Fratello*, the decision of the District of Columbia Circuit in *United States* v. *Wright*, *supra*, did deal with a factual situation like that presented by this case. However, *Wright's* discussion of Fifth Amendment principles does not appear to have been the basis for decision in that case: its conclusion seems instead to turn on the overbreadth of the trial court's order and the fact that the investigator there did not use his report to refresh his recollection while on the stand. To the extent that the Fifth Amendment was found to be implicated in *Wright*, the analysis of the court there was as unpersuasive, we submit, as was the analysis here.

Of the various values fostered by the privilege against self-incrimination, the courts both below and in *Wright* appear to have focused upon that described in *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55, as "our preference for an accusatorial rather than an inquisitorial system of criminal justice" and the concomitant requirement that "the government in its contest with the individual * * * shoulder the entire load," or, as the court put it in *Wright*, the

precept that the state must "investigate its own case, find its own evidence, and prove its own facts" (489 F. 2d at 1195).

Because of the timing of the court's disclosure order and its limited nature, however, we submit that there is no validity to these concerns in the context of this case. The trial court made clear that before the defense investigator's report would have to be disclosed, the government first must have put in its entire case in chief and withstood a motion for judgment of acquittal; the defense must have chosen to put on a defense and have opted for the tactic of offering the investigator to testify about the prior statements made to him by government witnesses; and the defense must have completed its direct examination of the investigator. The court stated (App. 25): "So the Court is not going to order the disclosure of any investigative reports until the investigator has taken the stand, testified in full and related, if he does, the allegedly impeaching statement."

Disclosure of the relevant portions of the investigator's report at that point would in no way alter the character of our accusatorial system or lift the burden of proof from the government's shoulders, for the government necessarily would have completed its investigation and proved its own facts in its case in chief. Moreover, since the trial court was prepared to examine the report *in camera* and excise irrelevant portions before disclosing it to the prosecutor, the government would receive no windfall of addi-

tional evidence that would assist it in refuting other aspects of the defense case, as occurred in *Wright*.

In sum, the order of the trial court, limited in scope and requiring production only after the direct examination of Bond, would merely have permitted the prosecution more effectively to use the "traditional truth-testing devices of the adversary process" in its cross-examination of Bond. *Harris* v. *New York*, *supra*, 401 U.S. at 225. The accusatorial system of justice is not compromised merely because respondent's decision to offer the investigator as a witness in his behalf requires the disclosure of the investigator's report, which in turn "may open the door to otherwise inadmissible evidence which is damaging to his case." *McGautha* v. *California*, *supra*, 402 U.S. at 213.

III. PORTIONS OF WRITTEN INVESTIGATIVE REPORTS REFLECTING STATEMENTS OF GOVERNMENT WITNESSES INTERVIEWED BY A DEFENSE INVESTIGATOR ARE NOT PROTECTED BY RULE 16 OR THE JENCKS ACT FROM DISCLOSURE DURING TRIAL FOR IMPEACHMENT PURPOSES.

The court of appeals also examined the district court's production order from the perspective of Rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act (18 U.S.C. 3500), and, after quoting both extensively, concluded its analysis as follows (Pet. App. 17a; emphasis in original):

> Thus, while Rule 16 is framed in terms of *pretrial* discovery, its inclusion of the Jencks Act leads us to conclude that Rule 16 has relevance to discovery *during* trial. And specifically, defense may discover, for purposes of impeachment, statements of government witnesses who have testified. *But* no such exception is included within the terms of subsection (c) [of Rule 16, which governs discovery by the government]. We would conclude that the work product of defense is inviolable under these circumstances. [Footnote omitted.]

This passage, we submit, reflects an erroneous understanding of Rule 16 and the Jencks Act.

Subsection (c) of Rule 16, on which the court relied, permits the trial court to condition a defendant's discovery against the government by requiring the defendant to allow the prosecution to inspect and copy books, papers, documents and other tangible objects in the defendant's possession or control "which the defendant intends to produce at the trial * * *." Under this reciprocal discovery provision, the government is generally given access to the same kind of material that the defendant can discover from the government. However, since the Jencks Act, 18 U.S.C. 3500, prevents a defendant from discovering statements of government witnesses prior to trial, Rule 16(c) likewise limits the scope of the government's pretrial discovery by exempting from pretrial disclosure statements of government or defense witnesses to the defendant, his attorney or agents.[24]

---

[24] Rule 16(c) also has a separate "work product" exception. The Rule does not authorize "the discovery or inspection of

It is difficult to see how any of this bears on the issue in this case. We do not rely upon the affirmative authorization in Rule 16(c) as a basis for the trial court's production order, for the quite apparent reasons that the question here is not one of reciprocal discovery, the portions of the report do not comprise material the defendant "intends to produce at the trial," and the case is not in any event concerned with pretrial discovery procedures. It therefore matters not that, had respondent sought pretrial discovery from the government and had he intended to produce the report at trial, nevertheless the government could not have discovered it through a Rule 16(c) reciprocal discovery order because of the exception for this type of material.

While the court below did say that "Rule 16 has relevance to discovery *during* trial" (Pet. App. 17a; emphasis in original) (a statement with which we disagree), it could hardly have meant that the Rule governs in-trial production of material by the defense. The affirmative portion of Rule 16(c) pertains only to material the defendant "intends to produce at the trial"; there is nothing in the language or history of Rule 16 in general or Rule 16(c) in particular to indicate that it relates in any way to trial practice. Indeed, it would be rather strange to have a rule that

---

reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case * * *." Similarly, under Rule 16(b), the defense may not discover the "work product" of the government.

required a defendant to produce at trial only what he intends to produce.[25]

The point is that once the trial has commenced the function of Rule 16 is ended. See Advisory Committee Note to Rule 16, Fed. R. Crim. P., 18 U.S.C. App., pp. 4493-4494.[26] While the Rule itself does

---

[25] We do not read the opinion of the court of appeals as attributing any separate significance to the Jencks Act (18 U.S.C. 3500) other than the fact that Rule 16(b) refers to it. By its terms, that Act is limited to disclosure to the defense, "[a]fter a witness called by the United States has testified on direct examination," of "statement[s] or report[s] in the possession of the United States which [were] made by a Government witness or prospective Government witness (other than the defendant) * * *." 18 U.S.C. 3500(a), (b). Respondent can derive no solace from the fact that the Act makes not the slightest reference to disclosure to the prosecutor of statements or reports in the possession of the defense. Such omission is hardly surprising, since the purpose of the Jencks Act was to limit the right of the defense to the production of statements of government witnesses—production that courts previously could and did order in the exercise of their inherent discretion. S. Rep. No. 981, 85th Cong., 1st Sess., pp. 2-4. See also *Palermo* v. *United States*, 360 U.S. 343, 361 (Brennan, J., concurring).

[26] The commentators are in agreement that Rule 16 is directed only at the pretrial situation. See, *e.g.*, Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L.J. 1276, 1279, 1282 n. 19 (1966); Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C. L. Rev. 437, 494-514 (1972); Note, *Prosecutorial Discovery under Proposed Rule 16*, 85 Harv. L. Rev. 994 (1972). As Mr. Justice Fortas stated in his concurring opinion in *Giles* v. *Maryland*, 386 U.S. 66, 101:

> On its face, the Rule is directed to the relatively limited problem of *pretrial* discovery and inspection in the federal courts. [Emphasis in original.]

not expressly use the term "pre-trial discovery," subsection (f) provides that a "motion under this rule may be made only within 10 days after arraignment or at such reasonable later time as the court may permit" and that the "motion shall include all relief sought under this rule." Moreover, the 1966 Advisory Committee Note observes that the "extent to which *pretrial discovery* should be permitted in criminal cases is a complex and controversial issue," and states that the "rule has been revised to expand the scope of *pretrial discovery*." 18 U.S.C. App., pp. 4493-4494 (emphasis supplied).[27]

Subsections (b) and (c) neither authorize nor preclude the in-trial production or use of witnesses' statements for impeachment purposes.[28] Subsection (b) merely emphasizes that the Rule does not provide for discovery of statements of government witnesses and that the federal criminal process only requires such production "as provided in 18 U.S.C. § 3500," the Jencks Act. Of course, there was no reason for inserting a comparable provision in subsection (c), the reciprocal discovery provision, since no congressional enactment comparable to the Jencks Act

---

[27] The proposed amendments to Rule 16 now pending in Congress reflect a continuing intention that Rule 16 govern only pretrial discovery. See Advisory Committee Note to Proposed Rule 16, Fed. R. Crim. P., 62 F.R.D. 309, 313, 314.

[28] The proposed amendments to Rule 16 would provide for reciprocal discovery before trial of names and addresses of witnesses but would not authorize pre-trial disclosure of ~~witnesses but would not authorize pretrial disclosure of~~ (2), (b)(1)(C), and (b)(2), Fed. R. Crim. P., 62 F.R.D. 305-306.

witnesses' statements. See Proposed Rule 16(a)(1)(E), (a)

limits the scope of production of defense witness statements.[29]

Rule 16 thus has no bearing on the question of in-trial production of the defense investigator's report at issue here. That is a separate evidentiary question, governed not by rule, but traditionally by

---

[29] Even if Rule 16(c)'s exemption clause expresses some general federal policy against requiring the production of a defendant's "work product" material at trial as well as before, the portions of the report ordered to be produced here do not fit within that category. The basic purpose of the work product rule is to protect the privacy of the attorney during his preparation for trial; the rule is thus intended only to protect "trial preparation materials" from inquiries that might disclose the mental processes of counsel, including trial strategy, legal opinions or conclusions, and the like. See McCormick, *Evidence*, § 96, p. 207.

But statements of witnesses—the essence of what was ordered produced here—do not reflect such mental processes. These were exempted from pretrial discovery by the government in Rule 16(c) not because of any "work product" rule but in order to put the defense on an even footing with the prosecution which, under the Jencks Act, would not have to turn over its witnesses' statements until trial. Once the trial has begun, however, the policy underlying the exemption no longer applies. If anything, the even-footing rationale supports our position, since it is clear that, had the report in question here been made by a government agent, it would have had to be supplied to the defense.

In discussing the work product exemption in Rule 16, the court of appeals relied on the intermediate New Jersey appellate court decision in *State* v. *Montague*, 101 N.J. Super. 483, 244 A. 2d 699, which characterized interview notes as work product of the defense attorney (Pet. App. 16a, n. 5). However, this analysis has been rejected by the State's highest court in *Montague*, which modified the decision relied upon by the court of appeals. See pp. 31-32 and n. 14, *supra*.

the discretion of the trial judge to regulate and control the scope of cross-examination at trial.[30]

Thus, since there is no federal statute or rule concerning in-trial production by the defense of the kind of material at issue here, the "[f]inal decision as to production must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge * * *." *Palermo* v. *United States, supra,* 360 U.S. at 353.[31] For, "[i]n the absence of specific legislation, questions of this nature are governed 'by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.'" *Gordon* v. *United States,* 344 U.S. 414, 418 (citing *Funk* v. *United States,* 290 U.S. 371, and Rule 26, Fed. R. Crim. P.); see also Fed. R. Evid. 501.[32]

---

[30] While the correct characterization of disclosure as discovery or evidentiary in nature is not always clear, the production of statements and reports during trial is governed by the rules of evidence. For example, in a case involving the non-production of possible Jencks Act material, Mr. Justice Douglas noted in an opinion for a unanimous Court:

> [O]ur *Jencks* decision and the Jencks Act were not cast in constitutional terms. * * * They state rules of evidence governing trials before federal tribunals * * *. [*United States* v. *Augenblick,* 393 U.S. 348, 356.]

[31] The inherent power of the courts to fashion rules of evidence was well illustrated in the *Jencks* case itself, for the rule announced there was not based on any statute or codified rule. See *Jencks* v. *United States, supra,* 353 U.S. at 668; *Palermo* v. *United States, supra,* 360 U.S. at 345-346.

[32] Rule 17(c) of the Federal Rules of Criminal Procedure, which authorizes the issuance of a subpoena *duces tecum,* is

As the dissenting judge correctly noted in this case (Pet. App. 24a):

> As repeatedly stated by the trial judge, we are not here concerned with the Jencks Act, 18 U.S.C. § 3500, or with Rule 16, F.R.Crim.P. Our problem centers on a simple common law evidentiary question of whether a witness, who was called for impeachment purposes, must produce the notes he admittedly made on the subject of impeachment.

---

available to the government "subject, of course, to such limitations as are imposed by the Fourth and Fifth Amendments." 1 Wright, *Federal Practice and Procedure,* § 274, p. 549 (1969). Of course, if there is no such prohibition on production of the report here, the government could subpoena the defense investigator to testify and produce those portions of the report during the government's rebuttal. To that extent, the court's production order involved merely a matter of timing, since the court reasonably concluded that it would be more appropriate for the material to be produced and used as a basis for cross-examination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the court of appeals should be reversed.

ROBERT H. BORK,
Solicitor General.

JOHN C. KEENEY,
Acting Assistant Attorney General.

ANDREW L. FREY,
Deputy Solicitor General.

PAUL L. FRIEDMAN,
Assistant to the Solicitor General.

SIDNEY M. GLAZER,
IVAN MICHAEL SCHAEFFER,
Attorneys.

MARCH 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 570712 122

Supreme Court, U. S.
FILED
APR 12 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-634

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT LEE NOBLES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT ROBERT LEE NOBLES

JOHN K. VAN DE KAMP
Federal Public Defender

NICHOLAS R. ALLIS
Deputy Federal Public Defender
707 U.S. Courthouse
312 North Spring Street
Los Angeles, CA 90012
Telephone: (213) 688-4796

Counsel for Respondent
Robert Lee Nobles

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

INTRODUCTION 1

STATEMENT 2

SUMMARY 8

ARGUMENT:

I. THE TRIAL COURT ERRED IN ORDERING DEFENSE COUNSEL TO DISCLOSE TO THE GOVERNMENT RELEVANT PORTIONS OF DEFENSE INVESTIGATOR'S REPORTS, AND COMPOUNDED ITS ERROR BY PRECLUDING THE INVESTIGATOR FROM TESTIFYING 13

A. THE RULES GOVERNING DISCLOSURE OF DOCUMENTS PROHIBIT GOVERNMENT INSPECTION OF A DEFENSE INVESTIGATOR'S REPORT AT ANY TIME 13

1. The Statutory Scheme Consisting Of Rule 16 Of The Federal Rules Of Criminal Procedure As Modified By 18 U.S.C. § 3500 Specifically Prohibited The Court From Ordering Production Of These Documents 14

2. Neither The Common Law Rule Of Evidence Nor The New Federal Rules Of Evidence Provide For Or Authorize The Discovery Of Any Part Of These Reports. 19

B. THE COURT'S ORDER IMPROPERLY INVADED CONFIDENTIAL COMMUNICATIONS OF THE DEFENSE TEAM 23

Page

1. The Ability Of Defense Attorneys, Particularly Appointed Counsel, Adequately To Represent Their Clients Will Be Jeopardized If Portions Of Investigator's Reports Are Made Available To The Government For Impeachment Purposes 23
2. A Shield Of Confidentiality Is Part Of The Sixth Amendment Right To Counsel. 29
3. The Work Product Doctrine, Established To Ensure Effective Representation Of Clients, Protects The Investigator's Reports From Enforced Production. 33

C. THE COURT OF APPEALS PROPERLY HELD THAT THE TRIAL COURT'S ORDER VIOLATED RESPONDENT'S PRIVILEGE AGAINST SELF-INCRIMINATION. 37

1. The Document Was Personal To Respondent And Testimonial Within The Meaning Of The Privilege Against Self-Incrimination. 37
2. Respondent Was "Compelled" To Disclose The Contents Of The Report Within The Meaning Of The Fifth Amendment; At No Time Did He Waive His Privilege Against Self-Incrimination. 41

D. THE SANCTION OF PRECLUSION WAS IMPROPER IN THAT IT VIOLATED RESPONDENT'S CONSTITUTIONAL RIGHTS TO COMPULSORY PROCESS AND CROSS-EXAMINATION OF WITNESSES. 48

Page

1. Respondent Was Denied The Right To Compulsory Process Guaranteed By The Sixth Amendment When He Was Not Permitted To Present The Testimony Of His Investigator. 49
2. The Court's Order Forbidding The Investigator From Testifying As To Prior Inconsistent Statements Of Government Witnesses Denied Respondent The Right Of Cross-Examination. 51
3. The Governmental Interests In Disclosure Of The Relevant Portions Of The Reports Did Not Justify The Penalty Of Forbidding Respondent The Right To Offer The Impeaching Testimony Of The Investigator. 52

II. THE MISCONDUCT OF THE PROSECUTOR CONSTITUTES A SEPARATE GROUND UPON WHICH THE JUDGMENT OF COURT OF APPEALS SHOULD BE AFFIRMED. 59

A. THE PROSECUTOR MISLED THE JURY AS TO THE REASONS JOHN BOND DID NOT TESTIFY TO THE IMPEACHING STATEMENTS OF THE EYEWITNESSES. 59

B. THE PROSECUTOR IMPROPERLY INTIMATED THAT AN INDEPENDENT DETERMINATION OF DEFENDANT'S GUILT HAD BEEN MADE PRIOR TO TRIAL, AND IMPROPERLY EXPRESSED A PERSONAL OPINION AS TO THE HONESTY OF GOVERNMENT WITNESSES. 61

Page

C. THE PROSECUTOR CONTINUALLY MISSTATED THE EVIDENCE 64

1. The Prosecutor Interrupted Cross-Examination of the Government Witnesses to Misstate Their Testimony In the Presence Of The Jury. 64

2. The Lineup And Photospread Occurred More Than Seven Weeks After The Robbery And Not Within 16 Days Of The Robbery. 65

3. Witness Hoffman Did Not Testify That A Struggle Involving Defendant Nobles Made Him Particularly Aware Of Nobles. 66

III. THE COURT'S REFUSAL TO PERMIT TESTIMONY OF RESPONDENT'S EYE-WITNESS IDENTIFICATION EXPERT WAS AN ABUSE OF DISCRETION AND CONSTITUTES A SEPARATE GROUND FOR AFFIRMING THE JUDGMENT OF THE COURT OF APPEALS 67

A. EYEWITNESS IDENTIFICATION IS AN APPROPRIATE SUBJECT MATTER FOR EXPERT TESTIMONY 69

B. THE EXPERT'S TESTIMONY WAS ADMISSIBLE UNDER THE OPINION RULE SINCE IT WOULD HAVE BEEN OF APPRECIABLE HELP TO THE JURY AND WAS NOT SUPERFLUOUS. 70

CONCLUSION 78

Page

TABLE OF AUTHORITIES

Cases:

Alford v. United States, 282 U.S. 687, 691, 692 12,52

Ashe v. Swenson, 397 U.S. 436, 442-443 51

Bellis v. United States, 417 U.S. 85, 101 40,46

Benson v. United States, 146 U.S. 325, 336 49

Berger v. United States, 295 U.S. 78 65,66

Black v. United States, Ante at 26 32

Boyd v. United States, 116 U.S. 616, 638 38,41,47-48

Brady v. Maryland, 373 U.S. 83, 87 10,17

Bram v. United States, 168 U.S. 532, 542 46

Brooks v. Tennessee, 406 U.S. 605, 610-11 42,54,55

Bruton v. United States, 391 U.S. 123, 126 51

Caldwell v. United States, 205 F.2d 879 cert. den. 349 U.S. 930 30,31,32,33

Carranza-Chaidez v. United States, 414 F.2d 503, 505 (9th Cir) 58

Chambers v. Mississippi, 410 U.S. 284, 302 (1973) 51

Clark v. Universal Builders Inc., 501 F.2d 324, 339 n.21 (7th Cir.) 75

Cohen v. Western Hotels, Inc., 376 F.2d 26, 27 (9th Cir) 68

Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.) cert. den. 393 U.S. 849 29

Coplon v. United States, 89 U.S. App. D.C. 103, 191 F.2d 749 31,32,33

Couch v. United States, 409 U.S. 322, 335 39,40,46

Dandridge v. Williams, 397 U.S. 471, 475-6, n.6 67

Donnelly v. DeChristoforo, 416 U.S. 637, 643 51

	Page
Duffy v. United States, 473 F.2d 840, 846 (8th Cir.)	31,34,35-36
Edens v. State, 235 Ark. 178, 359 S.W. 2d 432	34
Estelle v. Durrough, 43 U.S.L.W. 3497, 3498-3499 (U.S. Mar. 18, 1975)	50
Fisher v. State, 241 Ark. 545,408, S.W. 2d 894	34
Garrity v. New Jersey, 385 U.S. 493, 498	41
Giglio v. United States, 405 U.S. 150, 153	50
Gilbert v. California, 388 U.S. 263, 270	37
Giles v. Maryland, 386 U.S. 66, 102, 117-17 (1967)	16
Glasser v. United States, 315 U.S. 60, 76	29
Griffin v. California, 380 U.S. 609, 614	42,58
Griffin v. Illinois, 351 U.S. 12, 17	29
Hammond Packing Co. v. Arkansas, 212 U.S. 322, 341-42	56
Hall v. United States, 419 F.2d 582 (5th Cir.)	63
Haney v. Woodward & Lothrop, Inc., 330 F.2d 940, 946 (4th Cir.)	56
Harris v. New York, 401 U.S. 222	45,52
Hickman v. Taylor, 329 U.S. 495, 510-11	10,11,33, 34,35,36
Hoffa v. United States, 385 U.S. 293, 305-7	10,30,31 32,33,47
Hoffman v. United States, 341 U.S. 479, 486	11,47
Hovey v. Elliott, 167 U.S. 409, 429	56
In Re Grant, 198 F.708, 709 (S.D.N.Y.), *aff'd*. 227 U.S. 74	39
Indiviglio v. United States, 249 F.2d 549, 556 (5th Cir.)	16
Jenkins v. United States, 307 F.2d 637, 644 (C.A.D.C.)	75

	Page
Jones v. Superior Court, 58 Cal. 2d 56, 60, 22 Cal. Rptr. 879, 881	47
Kaplan v. California, 413 U.S. 115, 121	74
Kirby v. United States, 174 U.S. 47, 55	51
Lefkowitz v. Turley, 414 U.S. 70, 85	42
Levin v. Katzenbach, 363 F.2d 287, 295 (C.A.D.C.)	17
McGautha v. California, 402 U.S. 183	43,44
McMillan v. United States, 363 F.165, 168 (5th Cir.)	63
Maness v. Meyers, 95 S.Ct. 584, 592	48
Miranda v. Arizona, 384 U.S. 436, 460	47-48
Murphy v. Waterfront Comm'n, 378 U.S. 52, 55	10,11,17, 39,46
Padgett v. Buxton-Smith Mercantile Co., 262 F.2d 39, 41 (10th Cir.)	68
Palermo v. United States, 360 U.S. 343, 351	9,20,23
People v. Bais, 31 Cal. App. 3d 663, 107 Cal. Rptr. 519	45,46
People v. Boehm, 270 Cal. App. 2d. 13, 75 Cal. Rptr. 590	34
People v. Canfield, 12 Cal. 3d 699, 705, 117 Cal. Rptr. 81, 85	26
Pointer v. Texas, 380 U.S. 400, 403	51,57
Powell v. Alabama, 287 U.S. 45, 70	29
Prudhomme v. Superior Court of Los Angeles County, 2 Cal. 3d 320, 466 P.2d 673	46-47
Rhynard v. Filori, 315 F.2d 176, 178 (8th Cir.)	68
Rosen v. United States, 245 U.S. 467, 471	54
Salem v. United States Lines Co., 370 U.S. 31, 35 reh. den. 370 U.S. 965	68

	Page
San Antonio School District v. Rodriguez, 411, U.S. 1, 51	57
Schmerber v. California, 384 U.S. 757, 761	37
Shelton v. Tucker. 364 U.S. 479, 488	57
Simmons v. United States, 390 U.S. 377, 392	11,40,41, 43,44
Slochower v. Board of Education, 350 U.S. 551, 559	41
Smith v. California, 361 U.S. 147, 160	74-75
Smith v. Illinois, 390 U.S. 129, 131	51,52
Smith v. United States, 312 F.2d 867, 869 (C.A.D.C.)	16
Societe Internationale v. Rogers, 357 U.S. 197	12,56
Spencer v. Texas, 385 U.S. 554, 565	51
Spevack v. Klein, 385 U.S. 511, 516	42,48
Spring Co. v. Edgar, 99 U.S. 645, 658	68
State v. Bowen, 104 Ariz. 138, 449 P.2d 603	34
State v. Superior Court, 99 Ariz. 382, 409 P.2d 547	34
Tehan v. United States ex. rel. Shott, 382 U.S. 406, 415-16	46
Ullman v. United States, 350 U.S. 422, 427-8	46
United States v. American Ry. Express & Co., 265 U.S. 425, 435	67
United States v. Augenblick, 393 U.S. 348, 356	51
United States v. Bell, 506 F.2d 207, 222 (D.C. Cir.)	56
United States v. Burr, 25 F.Cas. 30, 32 (No. 14, 692d) (C.D. Va)	49
United States v. Cairns, 434 F.2d 643, 644 (9th Cir.)	71
United States v. Cohen, (9th Cir.) 338 F.2d 464, 468 (9th Cir.)	39

	Page
United States v. Costello, 222 F.2d 656, 662 (2nd Cir.)	56
United States v. DeCostor, 487 F.2d 1197, 1203 (C.A.D.C.)	29
United States v. Dellinger, 472 F.2d 340, 383 (7th Cir.)	71,75,76
United States v. Germany, 32 F.R.D. 421 (M.D. Ala.)	29
United States v. Hughes, 413 F.2d 1244, 1249 (5th Cir. 1969)	18
United States v. Judson, 322 F.2d 460, 467 (9th Cir.)	40
United States v. Kasmir, 499 F.2d 444, 453 (5th Cir.)	30
United States v. Palladino, 475 F.2d 65, 74 (1st Cir.)	75
United States v. Reynolds, 345 U.S. 1, 12	10,17,57
United States v. Seegar, 180 F.Supp. 467, 468 (S.D.N.Y.)	56
United States v. Smith, 117 F.2d 911 (9th Cir.)	16
United States v. Wade, 388 U.S. 218, 222	37
United States v. White, 322 U.S. 694, 699	38,39,40,46
United States v. Wright, 489 F.2d 1181, (C.A.D.C.)	*passim*
United States Smelting Co. v. Parry, 166 F.407, 411, 415 (8th Cir.)	68
Urga v. State, 85 So. 2d 629, 630	34
Wardius v. Oregon, 412 U.S. 470, 472, n.4	24,53
Washington v. Texas, 388 U.S. 14, 19	12,49,50,53, 54,55
Whitaker v. Blackburn, 74 So.2d 749, 795-96	34
Williams v. Florida, 399 U.S. 78, 82	42,43,53
Wilson v. United States, 221 U.S. 361, 378	38

Page

Miscellaneous:

American Bar Association Standards:

The Defense Function, § 2.3, p. 198 (Approved Draft, 1971) 25-26

The Defense Function, § 3.1(a) (1971) 25

The Defense Function, § 3.1(a), p. 201 (Approved Draft, 1971) 28

The Defense Function, § 7.5(a), (1971) 28

The Prosecution Function § § 5.8, 5.9 63

Relating to the Administration of Criminal Justice, Compilation, p. 126 (1974) 27,29

Amsterdam, Segal and Miller, *Trial Manual for the Defense of Criminal Cases II*, pp. 2-92 (1971) 27

Annot. A.L.R. 3d 412, 470 (1971) 34

Bailey and Rothblatt, *Investigation and Preparation of Criminal Cases Federal and State*, 57 (1970) 27

Bazelon, "The Defective Assistance of Counsel," 42 U. Cinn. L. Rev. 1, 6 (1973) 25

Beany, *The Right to Counsel in American Courts*, 220 (1955) 27

Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? 1963 Wash. U.L.Q. 279 24,25

Casper, Criminal Justice – The Consumers' Perspective, 23-9 (U.S. Dept. of Justice, 1972) 26

E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions: Civil and Criminal*, § 80.05, § 1134 (2d ed. 1970) 58

Effective Assistance of Counsel for the Indigent Defendant," 78 Harv. L. Rev. 1434 (1965) 29

Freeman, "The Public Defender System", J. Amer. Ind. Soc. 74, 76 (1948) 27

Page

Friedman, L., *Essentials of Cross Examination*, 16 (1968) 27

Friendly, "The Fifth Amendment Tomorrow and the Case for Constitutional Change", 37 U. Cinn. L. Rev. 671 (1968) 25

Gilligan, "Eyewitness Identification," 58 Military L. Rev. 183 (1972) 73

Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure", 69 Yale L. J. 1150 (1960) 24

Gorphe, "Showing Prisoners to Witnesses for Identification," 1 Am. J. Police Sci. 79, 82 (1930) 73

Interrogations in New Haven: "The Impact of Miranda", 76 Yale L. J. 1519 (1967) 26

Ladd, "Some Observations on Credibility: Impeachment of Witnesses," 52 Cornell L. Q. 239 (1967) 21,22

McKay, "Self-Incrimination and the New Privacy," 1967 The Supreme Court Review, 193, 206-14 46

McCormick, *Handbook of the Law of Evidence*, § 28 (1st ed. 1954) 21,71

Mansfield, "The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information," 1966 The Supreme Court Review, 103, 127 38-39

Medalie, Zeitz and Alexander, "Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda," 66 Mich. L. Rev. 1347 (1968) 26

Moore, J., *Federal Practice*, § 37.03 (2d ed. 1974) 16,56

Nakell, Criminal Discovery for the Defense and the Prosecution – The Developing Constitutional Considerations, 50 N. Car. L. Rev. 437 (1972) 17,24

Page

Note, "Developments in the Law, Discovery," 74 Harv. L. Rev. 940, 1063 (1961) 10,18

"The Preclusion Sanction – A Violation of the Constitutional Right to Present a Defense," 81 Yale L.J. 1342 (1972) 58,59

"Proposed 1967 Amendments to the Federal Discovery Rules," 68 Col. L. Rev. 271 (1968) 56

Proposed Rule 16, Federal Rules of Criminal Procedure, 62 F.R.D. 305-306 14,15,19

"Prosecutorial Discovery under Proposed Rule 16," 85 Harv.L.Rev. 994 (1972) 17,24,37

Rezneck, The New Federal Rules of Criminal Procedure, 54 Geo. L.J. 1276 (1966) 19

Schmertz, *Proposed Federal Rules of Evidence*, (Callaghan & Co., 1974) 21

Stern, "When to Cross-Appeal or Cross-Petition – Certainty or Confusion," 87 Harv.L.Rev. 763 (1974) 67

S. Rep. No. 981, 85th Cong., 1st Sess. (1957) 19

Westen, "The Compulsory Process Clause," 73 Mich.L.Rev. 71 (1974) 50,54

4 Wigmore, *Evidence* §§ 1259-60 (Chadbourn Rev. 1972) 21

8 Wigmore § 2264 (McNaughton Rev. 1961) 38-39

§§ 2270, 2307 38,40

Wilkerson, "Public Defenders as Their Clients See Them," 1 Am.J. Crim.L. 141 (1972) 26

"Work Product in Criminal Discovery," 1966 Wash. U.L.Q. 321 (1966) 34

C. Wright, *Law of Federal Courts* § 82 at 362 (2d ed. 1970) 35

8 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2283 at 763 (1970) 56

Page

1 C. Wright, *Federal Practice and Procedure*, § 251 at 490 18

Constitution, Statutes and Rules:

United States Constitution:

Fifth Amendment ..... *passim*

Sixth Amendment ..... *passim*

18 U.S.C. 3006(a) (1964) as amended 18 U.S.C. 3006(a) (Supp. 1972) 29

18 U.S.C. 3500 (The Jencks Act) ..... *passim*

Federal Rules of Criminal Procedure:

Rule 16 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-634

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT LEE NOBLES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT ROBERT LEE NOBLES

QUESTIONS PRESENTED

1. Whether the trial court erred in conditioning the respondent's right to present the defense investigator's impeaching testimony upon production to the prosecution of portions of the investigator's report containing the prior inconsistent statements of the government witnesses to the investigator.

2. Whether the misconduct of the prosecutor constitutes a separate grounds for affirming the judgment of the court of appeals.

3. Whether the trial court abused its discretion in refusing to permit the testimony of respondent's expert on eyewitness identification and whether such error constitutes a separate grounds for affirming the judgment of the court of appeals.

CONSTITUTIONAL PROVISION, STATUTE AND RULES INVOLVED

Respondent adds the following to those stated by the government:

1. The Sixth Amendment to the United States Constitution provides in pertinent part,

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT

Respondent, Robert Lee Nobles, and two others were convicted of armed bank robbery in violation of 18 U.S.C. § 2113 (a) (d).[1] The conviction of respondent was reversed by a panel of the United States Court of

[1] A fourth individual was indicted for the offense but did not stand trial.

Appeals for the Ninth Circuit, with one judge dissenting. [Pet. App. A; 501 F.2d 146][2] The court of appeals denied a petition for rehearing with a suggestion for rehearing en banc. [Pet. App. C]

The court of appeals recognized that the evidence against respondent was relatively meager, consisting primarily of the testimony of two eyewitnesses, Peter Van Gemeren, a bank teller [Tr. 22-23] and Gary Hoffman, a salesman visiting the bank [Tr. 323-25, 420-21].[3] Van Gemeren identified respondent as the man standing under the surveillance camera, although the man under this camera was the farthest away from him (approx. twenty feet) of any of the four robbers. [Tr. 38]. A post which he testified was 7 inches wide but which was later shown to have dimensions of 20 x 11¾ inches stood between him and the surveillance camera. [Tr. 535] He admitted that he had paid closer attention to two of the other robbers. [Tr. 35, 38]

[2] The convictions of the other two defendants, Tommie Louis Brown and Virgil David Swain, were affirmed.

[3] The court of appeals concluded that the "eyewitness testimony was far less impressive against Nobles than against Brown and Swain." [Pet. App. 6a] The only other evidence introduced against respondent consisted of an ambiguous statement: at the time of his arrest, he denied he was Robert Lee Nobles, and subsequently stated that he knew the F.B.I had been looking for him. The evidence against Brown and Swain, on the other hand, was overwhelming; it included items such as a gun and clothes taken from an apartment shared by them, a statement by Brown, testimony by a number of eyewitnesses, surveillance photographs, and the testimony of an F.B.I. expert who compared the surveillance photographs of the robbers with known photographs of Brown and Swain.

Van Gemeren did not remember whether the man under the surveillance camera faced toward him or away from him, but thought that his side was visible for a "half a minute" [App. 9]; he acknowledged finally that for "most of the time" the man's back was to him. [App. 9] Van Gemeren also acknowledged that he told the F.B.I. the man was facing toward the bank manager [Tr. 58, 60, 70], and therefore away from Van Gemeren.[4] Despite Van Gemeren's testimony, the prosecutor interrupted defense counsel's cross-examination, misstating the evidence in the presence of the jury, and claiming "this witness has testified as to the fact that he observed this person's face, that he then turned toward the bank manager, he saw him from the side and from the front." [App. 10]

Van Gemeren's memory proved faulty concerning many important details of the robbery. He could not recollect whether the man under the surveillance camera was wearing a hat or jacket. [Tr. 33-4] He could not "recall" the exact date of the robbery. [Tr. 43] He could not "recall" whether it was the F.B.I. or Los Angeles Police Department Officials who interviewed

[4]The bank was designed so that as one entered the front door, a series of teller's cages extended to the left, from the front to the rear of the bank. To the right, extending from front to rear, was the business counter. Directly in front of the door was a lobby. The surveillance camera was placed near the ceiling to the right of the front door and about three feet into the lobby from the business counter. (See diagram of bank, Govt. Ex. 1; Tr. 252) The bank manager was seated behind the business counter. [Tr. 58] Van Gemeren, a teller, was standing behind a teller's cage directly across the lobby from the business counter. [Tr. 14-15, 58]

him two weeks after the robbery or on other occasions. [Tr. 42, 70]. When asked if he had told the F.B.I. two weeks after the robbery that the man under the surveillance camera had "black hair, worn bushily" and had worn a "floppy hat", Van Gemeren turned to the judge and stated, "Your Honor, that interview was many weeks ago. I cannot recall what I said." [Tr. 64] On April 11th, he could not "recall" that on the previous day he had testified that he could not "recall" whether the man under the surveillance camera was looking toward him or away from him. [R.T. 88] He could not "recall" whether he had told John Bond, chief investigator for the Federal Public Defender, that the only part of the man he had seen was his back. [App. 11, 12] He also could not "recall" whether the day on which John Bond interviewed him was nearer in time to the bank robbery than "today." [Tr. 100]

Two months after the robbery, on the morning of trial, Van Gemeren saw respondent for the first time. The prosecutor told him to go into the courtroom and look at the three defendants to see if he could recognize any of them. [Tr. 82-84] Van Gemeren went into the courtroom and sat down in the second or third row. He saw the defendants seated in the first row, ahead of him and to his left. He decided, based on this observation, that Robert Lee Nobles was one of the robbers. [Tr. 82-84]

Gary Hoffman, the other eyewitness, identified Robert Lee Nobles as the man standing with his back against the business counter, 24 feet away from the surveillance camera on his left and facing the tellers' cages across the lobby. [Tr. 318, 327; see note 4, supra]. He said the robbery lasted from 5-8 minutes

and he focused his attention on the man underneath the camera for 2-3 minutes [Tr. 328]. However, he also testified that he observed defendant Brown working behind the tellers' cages for three or four minutes, then watched him jump the counter at the rear and exit the bank [Tr. 343, 344]. Hoffman said the man under the camera generally faced toward the tellers' cages and occasionally shifted to his right [App. 18] Although Hoffman never said that the robber faced him – his testimony, in fact, indicated that he saw the robber only from the side – the prosecutor interrupted the cross-examination and stated, in front of the jury, "He said he faced both ways, toward the witness and toward the tellers' area". [App. 19][5]

Directly contrary to the testimony of Van Gemeren was that of Hoffman, who testified subsequently that he did not recall the man under the surveillance camera facing the business counter at any time. (App. 19) Hoffman said that when F.B.I. agent Wilkins showed him some photographs seven weeks after the robbery, he hoped that the meeting would not be a waste of time and that he would be able to pick out someone from the photographs. [Tr. 394] At that time, Hoffman told Agent Wilkins that he could give only a general description of the robber who stood underneath the surveillance camera. He picked Nobles' photograph from a group of six pictures, but was not absolutely

[5]If the man under the surveillance camera were facing the tellers' cages, he would have had to turn more than 90° to his right to face Hoffman, since the surveillance camera was located several feet into the lobby from the business counter against which Hoffman was leaning. [Tr. 381; see note 4, supra].

sure that he was the man. [Tr. 401] Two days later, on March 30th, he attended a lineup, and, seeing Robert Lee Nobles for the first time, chose him from the lineup, although he was not 100% sure that he was one of the robbers. [Tr. 404]

Hoffman testified that the robber who was underneath the surveillance camera was the one he saw most clearly, but subsequently admitted that he told John Bond, respondent's investigator, that "the man who was standing at the teller's cage directly across from [him] was the one [he] could see more clearly and would be able to identify." [Tr. 417] That robber was alleged to be the man who did not stand trial. Hoffman denied telling John Bond that all blacks look alike [App. 10].

Respondent presented a defense of alibi, but, as the court of appeals noted, his strongest defense was in showing the weakness of the identifications by Van Gemeren and Hoffman. Respondent, however, was not permitted to present his most compelling evidence which would have destroyed the credibility of the eyewitnesses' testimony. First, the court refused to permit respondent's expert in eyewitness identification to testify. Second, the court refused to permit respondent's investigator, John Bond, to impeach the testimony of the eyewitnesses with prior inconsistent statements. Bond would have said that Van Gemeren had previously told him that "as far as the man at the surveillance camera is concerned he (Van Gemeren) only saw the back of that man" [App. 15], and that Hoffman had previously told him that "all blacks look alike." [App. 10]

The court precluded John Bond's testimony because defense counsel signified that he would not obey the

court's order to disclose to the government, at the end of the direct testimony of John Bond, "those portions of [John Bond's investigative] report which contain . . . the alleged impeaching statements of the witnesses." [App. 32-3] Although the reports corroborated what would have been John Bond's testimony, defense counsel realized that the order represented a dangerous precedent, a precedent which would substantially alter the rules governing discovery of defense documents and violate the constitutional rights of respondent. [App. 25a-26a] (Deft. ex. H , Tr. 751)[6] The court of appeals agreed and reversed the conviction of respondent.

SUMMARY

1. The trial court's order that defense counsel disclose to the government those portions of John Bond's investigative reports which contained the inconsistent statements of the eyewitnesses violated the rules of discovery governing disclosure of documents at trial.

---

[6] Despite the fact that the prosecutor knew Bond would have testified to the impeaching statements, had he been permitted to do so, he told the jury during closing argument that Bond did not testify because the witnesses had never made the statements to him. [App. 41] After the prosecutor's closing argument, defense counsel objected to his statements and had John Bond's reports lodged with the court for inspection by the court of appeals. Hoffman's statement was marked as defense exhibit G at that time but now is defense exhibit H on the list of exhibits. Van Gemeren's statement had already been placed with the clerk as defense exhibit A [Tr. 750-1, 753].

Both the court of appeals in the instant case and the only other federal court which has faced the issue presented by this case, have held that the statutory scheme, composed of Rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act, 18 U.S.C. § 3500, specifically prohibits discovery of defense investigator's reports at any time. (Pet. App. 1a); *United States v. Wright*, 489 F.2d 1181, 1191-2 (C.A.D.C.). Thus, Rule 16(c) in its work product savings clause, forbids the "discovery or inspection" of "reports" made by a defense investigator "in connection with the investigation" of the case or of "statements" of "government witnesses" to the "agents" of the defendant. Rule 16 sets standards for disclosure at trial as well as prior to trial, as evidenced by the fact that the rule carefully includes the exception to discovery of statements in the Jencks Act, applicable by its terms only at trial. The Jencks Act gives defendants access to statements of government witnesses after their direct testimony. The act provides for no reciprocal right of the government to discover statements of defense witnesses at any time.

The common law rules of evidence in effect at the time of the trial and the new Federal Rules of Evidence complement this statutory scheme and neither provide for nor authorize discovery of any part of these reports.

Thus, while the trial judge may have had discretion during trial to fashion orders which interpreted as well as supplemented Rule 16 and the Jencks Act, he did not have discretion to order disclosure which the rules specifically prohibit. *Cf. Palermo v. United States*, 360 U.S. 343.

The government's proposal is incompatible with the fundamental principal of our accusatory system that the government "shoulder the entire load" of proof. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55. A defendant has no obligation to assist the government. On the other hand, the government has a duty to provide information to the defendant which is material to his defense. *See United States v. Reynolds*, 345 U.S. 1, 12; *Brady v. Maryland*, 373 U.S. 83, 87. As a consequence, the suggestion that the government's discovery rights should be as broad as those of the defense contravenes the policy of favoring the defendant in order to avoid conviction of the innocent. Note, "Developments in the Law, Discovery," 74 Harv.L.Rev. 941, 1063 (1961).

2. The government's proposal would also undermine the underlying principle of our adversary system that privacy is vital to the preparatory efforts of the defense team and is a necessary corollary of effective representation. *See Hickman v. Taylor*, 392 U.S. 495. The knowledge that the defense may provide information in its investigative reports to the government will undermine the relationship of trust and confidence between attorney and client, and inhibit vigorous investigation of cases. The resulting inability of the defense to gather and sift all the facts will result in neglected defenses and unnecessary trials.

In a criminal case, the Sixth Amendment right to effective assistance of counsel provides a shield of confidentiality for the communications of the defense team against governmental intrusion. *See generally*, *Hoffa v. United States*, 385 U.S. 293, 305-7. The work product doctrine also prohibited the discovery of any

part of these reports. Although developed in the context of civil cases, the interest supporting the doctrine – enabling the defense to prepare in private – is even more compelling in the context of criminal cases where liberty is at stake and where, as the ABA has recognized, the difficulties of establishing a relationship of trust and confidence with a client are particularly severe. *See Hickman v. Taylor, supra*. ABA Standards, The Defense Function, § 2.3 pp. 197-98 (App. Draft 1971)

3. The court of appeals correctly held that respondent's Fifth Amendment privilege against self-incrimination was violated when he was ordered to disclose portions of John Bond's reports. These documents were "communicative or testimonial" within the meaning of the privilege because they reflected the thought processes of respondent's agent and their production would subject respondent to the "cruel trilemma of self-accusation, perjury, or contempt . . ." *Murphy v. Waterfront Commission*, 378 U.S. 52, 55.

Unquestionably, petitioner was "compelled" within the meaning of the privilege since he paid a double price for the exercise of the privilege: not only did he forego his Sixth Amendment right to compel the production of a witness in his own behalf who would have completed impeachment of the eyewitnesses, but he suffered irreparable prejudice when the prosecutor called the jury's attention to respondent's failure to produce that testimony. *Simmons v. United States* 390 U.S. 377, 392.

The privilege applies to any documents that might form a "link in the chain" of evidence against the accused (*Hoffman v. United States*, 341 U.S. 479, 486),

even if the government obtains the documents after the close of its case in chief, since the government could utilize the evidence during reopening of its case, as ammunition for cross-examination, during rebuttal, or at a new trial.

4. The court's preclusion of the testimony of John Bond was an unconstitutional sanction. Respondent was denied the testimony of his most important witness, in violation of his right, pursuant to the Sixth Amendment, to compel the attendance of witnesses. *Washington v. Texas*, 388 U.S. 14, 23. The court's order also deprived respondent of his right to complete the impeachment of the eyewitnesses, guaranteed by the confrontation clause of the Sixth Amendment. *See Alford v. United States*, 282 U.S. 687, 891.

The interests underlying the court's order did not justify infringing these fundamental rights given the availability of less drastic sanctions, the "conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons . . . " (*Washington v. Texas* at 22), and the lack of bad faith on the part of defense counsel who believed he had a valid legal claim of protection to the documents. *Societe Internationale v. Rogers*, 357 U.S. 197.

5. Respondent's right to counter the testimony of the two eyewitnesses was improperly prejudiced in two additional ways.

First, the prosecutor improperly bolstered their testimony throughout the trial and cultivated a false impression of defense irresponsibility by telling the jury that John Bond had not testified because the impeaching statements had never been made, although he was well aware that the court had precluded Bond

from testifying. Second, respondent was not permitted to call his expert in eyewitness identification although the expert's testimony would have appreciably aided the jury.

ARGUMENT

I.

THE TRIAL COURT ERRED IN ORDERING DEFENSE COUNSEL TO DISCLOSE TO THE GOVERNMENT RELEVANT PORTIONS OF THE DEFENSE INVESTIGATOR'S REPORTS, AND COMPOUNDED ITS ERROR BY PRECLUDING THE INVESTIGATOR FROM TESTIFYING.

A. THE RULES GOVERNING DISCLOSURE OF DOCUMENTS PROHIBIT GOVERNMENT INSPECTION OF A DEFENSE INVESTIGATOR'S REPORT AT ANY TIME

Essentially, this case deals with the rules of evidence which apply during a criminal trial, and with the mistake made by a trial judge in the interpretation of these rules. The decision of the Court of Appeals was an exercise of its supervisory powers to correct such a ruling.

Forced production of any part of a defense investigator's reports of his interviews with government witnesses is clearly prohibited by the statutory scheme consisting of the Federal Rules of Criminal Procedure and the Jencks Act. See *United States v. Nobles* [Pet.

App.17a]. *United States v. Wright*, 489 F.2d 1181, 1191-2 (C.A.D.C.). The common law rules of evidence in effect at the time of trial and the new Federal Rules of Evidence complement this statutory scheme and implicitly forbid the production of these reports.

1. The Statutory Scheme Consisting Of Rule 16 Of The Federal Rules Of Criminal Procedure As Modified By 18 U.S.C. §3500 Specifically Prohibited The Court From Ordering Production Of These Documents

The Court of Appeals held correctly that the Federal Rules of Criminal Procedure specifically forbid discovery of a defense investigator's reports at any time. [Pet. App. 17a] Rule 16(c) prohibits the,

> " . . . discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys."

Thus, reports of defense investigator John Bond to the attorney concerning his interviews were immunized from discovery, both because: 1) they are "internal defense documents", and 2) they are "statements made by . . . government . . . witnesses . . . to the defendant['s] . . . agents." *See United States v. Wright*, 489 F.2d 1181, 1191 (C.A.D.C.). These provisions remain unchanged in the Proposed Amendments to the Rules. See Proposed Rule Fed. R.Crim. P. 16(b) (2), 62 F.R.D. 306.

Petitioner claims that Rule 16 applies only to pre-trial discovery. [Pet. br. 62] However, the language of the rule itself, the policy interests involved, and the decisions of courts which have considered the problem, demonstrate that Rule 16 also applies during the trial. Subsection (b) of Rule 16 provides, in pertinent part, that:

> "This rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government *except as provided in* 18 U.S.C. § 3500. [Jencks Act] (emphasis added)

The court of appeals reasonably concluded,

> "Thus, while Rule 16 is framed in terms of *pretrial* discovery, its inclusion of the Jencks Act leads us to conclude that Rule 16 has relevance to discovery *during* trial. And specifically, defense may discover, for purposes of impeachment, statements of government witnesses who have testified. *But* no such exception is included within the terms of subsection (c). We would conclude that the work product of defense is inviolable in these circumstances. [footnote omitted] *See also, United States v. Wright*, 489 F.2d 1181, 1189-1190 (D.C. Cir.)" (emphasis in original) [Pet. App. 17a].

The proposed amendments to the Federal Rules of Criminal Procedure leave this subsection substantially unchanged. Proposed Rules 16(a) (2), (b) (2), Fed. R. Crim. P., 62 F.R.D. 305-6.

Unquestionably, Rule 16 contemplates and encourages pretrial discovery motions, but subsection (f), relied on by petitioner, does not forbid discovery motions under Rule 16 at trial. Moreover, a party's continuing duty to disclose under Subsection (g) persists "during trial."[7]

Those courts which have dealt with the question of whether the rules set guidelines for discovery during trial have answered in the affirmative. *See United States v. Nobles* [Pet. App. 1a]; *United States v. Wright*, 489, F.2d 1181, 1191 (C.A.D.C.).[8]

---

[7] In addition, petitioner is mistaken in concluding that because 16(c) provides that the government may only inspect material "which the defendant intends to produce at trial," the rulemakers must have been concerned solely with pretrial procedure. [Pet. br. 62-3] Petitioner's reasoning is based on the faulty premise that discovery of material during a trial, which the defense intends to produce at trial, would never be helpful to the government. On the contrary, discovery of defense material during trial, prior to the time the defense actually utilizes the material, may be very useful to the government. Consequently, a government motion for discovery at trial may be appropriate, and any such motion shall be subject to the specific limitations on discovery of defense documents set forth in Rule 16(c).

[8] *See Indiviglio v. United States*, 249 F.2d 549, 556 (5th Cir.); *Smith v. United States*, 312 F.2d 867, 869 (C.A.D.C.) *Cf. Giles v. Maryland*, 386 U.S. 66, 102, 117-18 (1967) (*Harlan, J. dis.*) In *Indiviglio, supra,* the court stated,

"...Rule 16 was intended primarily to cover discovery and inspection before the beginning of the trial. But it is generally accepted that its civil counterpart (Fed. Rules of Civil Procedure Rule 34, 28 U.S.C.A.), couched in similar language—neither providing any time limit—may be utilized during the course of trial, 4 Moore's Federal Practice, Second Edition, pp. 2440, et seq. *United States v. Smith*, 117 F.2d 911 (9th Cir.). There is

In regard to protecting the inviolability of internal defense documents, policy considerations are the same during trial as they are prior to trial. Discovery of defense investigators' reports at any time would be inconsistent with the fundamental principle of our accusatorial system of justice, that the government "shoulder the entire load" of proof. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55; *United States v. Wright*, 489 F.2d at 1195. The defendant has no obligation to assist the government in making its case. *See Levin v. Katzenbach*, 363 F.2d 287, 295 (C.A.D.C.) (Burger, J., dissenting).

The government, on the other hand, not only "prosecutes an accused [but] also has the duty to see that justice is done...." *United States v. Reynolds*, 345 U.S. 1, 12. Therefore, "...it [would be] unconscionable to allow it to undertake prosecution and then invoke its ... privileges to deprive the accused of anything which might be material to his defense...." *Id.*, 345 U.S. 1, 12; Thus the government must provide exculpatory material to defendants. *Brady v. Maryland*, 373 U.S. 83, 87. The Jencks Act also is

---

every reason to hold the same thing with respect to Rule 16." 249 F.2d at 556.

Petitioner is mistaken in stating that the "commentators are in agreement that Rule 16 is directed *only* at the pretrial situation." [Emphasis added] Pet. Br. at 63, n.26. Two of the three commentators cited by petitioner do not state this proposition or concern themselves with the issue. Nakell, "Criminal Discovery for the Defense and the Prosecution - The Developing Constitutional Considerations, 50 N.C.L. Rev. 437, 494-514 (1972); Note, "Prosecutorial Discovery Under Proposed Rule 16," 85 Harv. L. Rev. 994 (1972).

part of that duty. Consequently, inequality of discovery is not only compatible with, but required by, the fundamental philosophy of our criminal system, and "any suggestion that the state must have at least as good a chance as the defendant to prevail would seem to violate the traditional policy of favoring the defendant in order to avoid conviction of the innocent." Note, "Developments in the Law, Discovery", 74 Harv. L. Rev. 940, 1063 (1961). Consistent with this philosophy, the Advisory Committee was careful in framing Rule 16 not to expand the government's right to discovery to the same degree that it expanded the defense right.[9] The Jencks Act, 18

[9]The 1966 revision of the Rules represented a break with the established policy of non-disclosure by the defendant. Before enactment of Rule 16, a practice of non-disclosure on both sides had been customary. *United States v. Hughes*, 413 F.2d 1244, 1249 (5th Cir. 1969). At the time Rule 16 was first recommended in 1944, it was thought doubtful that the law allowed any discovery in a criminal case. 1 C. Wright, *Federal Practice and Procedure*, §251 at 490. It was not until 1966, that Rule 16 was amended to give any discovery powers to the prosecution, and even then the government was granted only "a limited right of discovery under certain circumstances." *Wright, supra*, at 492. Even this minor change was opposed by two members of the Court. Justice Black wrote a vigorous dissent in which he warned, ". . .some of the proposed rules go to the very borderline if they do not acutally transgress the constitutional right of a defendant not to be compelled to be a witness against himself." Order of February 28, 1966 Amending Criminal Rules, 383 U.S. 1032 (1966).

Pursuant to Rule 16, the government is entitled to discover only material defendant intends to produce at trial. There is no such restriction on defense discovery of government material. In addition, the government, not the defense, is subject to

U.S.C. § 3500, is consistent with the traditional policy of protecting the accused reflected in Rule 16. Section 3500 expands the statutory discovery rights of defendants to include the right to statements of government witnesses after they have testified on direct examination. The Jencks Act provides for no reciprocal right of the government to discover statements of defense witnesses in defense files at any time. Absent any statutory compulsion similar to § 3500, the exclusive terms of § 3500 indicate that a court has no authority to require the defendant to surrender statements of witnesses to the government.[10]

2. Neither The Common Law Rules Of Evidence Nor The New Federal Rules Of Evidence Provide For Or Authorize The Discovery Of Any Part Of These Reports.

The common law rules of evidence and the new Federal Rules of Evidence, which will govern at any

disclosure provisions of the Jencks Act. The proposed amendments retain these restrictions on governmental discovery. Proposed Rule 16(a)(1), (a)(2), (b)(1), (b)(2), 62 F.R.D. 305-306. Rule 16, as presently worded, makes discovery by the government conditional on defense discovery. There is no reciprocal provision. *See* Rezneck, "The New Federal Rules of Criminal Procedure", 54 Geo. L. J. 1276 (1966).

[10]The legislative history of the Jencks Act reveals this language in S. Rep. No. 981, 85th Cong. 1st Sess. (1957):

> "The purpose of the proposed legislation is to amend chapter 223, title 18 U.S.C. to provide the *exclusive* procedure for handling demands for the production of statements and reports of witnesses." (emphasis added)

In interpreting §3500, this Court emphasized that it is the exclusive authority by which disclosure during trial may be

trial after July 1, 1975, define probative evidence and the restrictions on its use. Ancillary rules provide a narrow set of circumstances under which a document not produced at trial must be shown to the opposing party. Neither the common law nor the new Federal Rules provide for or authorize the discovery of these documents.

(a) Petitioner discusses the possibility that John Bond refreshed his recollection by reading the reports. That issue is not present in this case. As the court of appeals found, there is absolutely no evidence in the record that John Bond refreshed his recollection (Pet. App. 15a, n.4); the possibility was neither raised nor discussed by either the prosecutor or the trial judge. In fact, petitioner's proposal would, as the court in *Wright* noted, modify the rules of evidence by "doing away with the requirement that the statement be used to refresh recollection either before or while testifying." *United States v. Wright*, 484 F.2d 1181, 1191 (C.A.D.C.)

(b) Petitioner also urges that Rule 613(a) of the new Federal Rules of Evidence would require, at a new trial, that if defense counsel cross-examines the eyewitnesses as in the first trial, he show opposing counsel portions of John Bond's report containing their statements.

Petitioner is mistaken. Rule 613 would no more permit such discovery then would the common law upon which it was based. The common law requirement

compelled: "...statements of a government witness made to an agent of the government which cannot be produced under the terms of 18 U.S.C. §3500 cannot be produced at all." *Palermo v. United States*, 360 U.S. 343, 351.

known as the Rule of The Queen's Case would require counsel to show the eyewitnesses any statement written or signed by them during cross-examination about the writings.[11] No such statements were in the possession of the defense. The rule does not require production of a report written by a third person (the investigator) and not signed by the eyewitnesses.

A second reason the rule would not require production of these documents is that the witnesses were not being cross-examined about a writing of any kind, much less one they wrote or signed. Instead the cross-examination focused on their *oral* statements to John Bond.

The Advisory Committee Note makes it clear that Rule 613(a) was intended to eliminate the common law requirement that a document written or signed by the witness be shown to him, because the rule constitutes a needless obstruction to cross-examination by warning the witness that the questioner possesses a document he has written which may be inconsistent with his testimony.[12] The common law rule also confuses "the principles applicable to the best evidence rule with principles applicable to cross-examination," by forcing

[11]The commentators cited by the Federal Rules of Evidence Advisory Committee all agree with this interpretation of the common law rule. Ladd, "Some Observations on Credibility: Impeachment of Witness," 52 Cornell L.Q. 239, 246-247 (1967); McCormick, *Handbook of the Law of Evidence*, §28 (1st ed. 1954); 4 Wigmore, *Evidence* §1259-1260, (Chadbourn Rev. 1972); Advisory Committee Note to Rule 613, Fed. R. Evid., 56 F.R.D. 278-279.

[12]See Schmertz, *Proposed Federal Rules of Evidence*, editor's Introduction and Commentary, p. 16 (Callaghan & Co., 1974).

counsel to produce a document before he is ready to introduce it into evidence. Ladd, "Some Observations on Credibility: Impeachment of Witnesses," 52 Cornell L.Q. 239, 246-247 (1967).

Rule 613(a) provides that

> "In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown or its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel." 56 F.R.D. 278.

Rule 613(a) requires that documents written or signed by the witness be "shown" to opposing counsel, not to the witness. It also provides that oral statements be "disclosed" to opposing counsel. Thus, defense counsel in this case would comply with the requirement by explaining to opposing counsel the "contents" of the oral statements to John Bond. The purpose of the requirement is to "protect against unwarranted insinuations," the theory being that an attorney who might be willing to insinuate through a question that the witness made a particular statement, would not be willing to actually lie to opposing counsel and fabricate a prior inconsistent statement. See Advisory Committee Note to Rule 613(a) Fed. R. Evid., 56 F.R.D. 278. Of course, the protection against an "unwarranted insinuation" is complete when, as here, the defense is able to produce a witness, John Bond, who heard the prior inconsistent statement and is willing to testify to it.

(c) The rules of evidence in no way modify the protection given these documents by Rule 16 of the Federal Rules of Criminal Procedure. The conclusion of the court of appeals in *Wright* is applicable to this case:

> "With respect to issues touched on by the government's proposal, primary responsibility for development of the law has been assumed by Congress and the rulemakers. No doubt, there always remains room for case-by-case development of the law—to fill gaps in a statute or rule, to solve problems not considered by the draftsmen, or to interpret text in a manner which achieves substantial justice. The government's proposal, however, works a major change in procedure. Depending on one's perspective, it would expand or narrow the specific rights and privileges granted by statute and by rule, and would be in conflict with the plain language of these provisions. *Cf. Palermo v. United States*, 360 U.S. 343, 78 S.Ct. 1217, 3L.Ed. 2d 1287 (1959)." *United States v. Wright*, 489 F.2d 1181, 1192 (C.A.D.C.).

The potential significance of this violation of traditional trial procedure justified defense counsel's action in refusing to disclose the relevant portions of the reports, despite the fact that they corroborated the offer of proof as to John Bond's testimony. (See n.6, *supra*).

B. THE COURT'S ORDER IMPROPERLY INVADED CONFIDENTIAL COMMUNICATIONS OF THE DEFENSE TEAM

1. The Ability of Defense Attorneys, Particularly Appointed Counsel, Adequately To Represent Their Clients Will Be Jeopardized If Portions Of Investigator's Reports Are Made Available To The Government For Impeachment Purposes

Theoretically, an adversary system demands that prosecution and defense be equally strong. In reality,

however, the defense has traditionally been weaker. One reason for this imbalance is the inherent advantages possessed by the government in the preparation of a criminal case.[13]

[13]This Court in *Wardius v. Oregon*, 412 U.S. 470, 475, n.9 noted the State's "inherent information gathering advantages", and quoted a commentator: "Besides greater financial and staff resources with which to investigate and scientifically analyze evidence, the prosecutor has a number of tactical advantages. First, he begins his investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events. Only after the prosecutor has gathered sufficient evidence is the defendant informed of the charges against him; by the time the defendant or his attorney begins any investigation into the facts of the case, the trail is not only cold, but a diligent prosecutor will have removed much of the evidence from the field. In addition to the advantage of timing, the prosecutor may compel people, including the defendant, to cooperate. The defendant may be questioned within limits, and if arrested his person may be searched. He may also be compelled to participate in various non-testimonial identification procedures. The prosecutor may force third persons to cooperate through the use of grand juries and may issue subpoenas requiring appearance before prosecutorial investigatory boards. With probable cause the police may search private areas and seize evidence and may tap telephone conversations. They may use undercover agents and have access to vast amounts of information in government files. Finally, respect for government authority will cause many people to cooperate with the police or prosecutor voluntarily when they might not cooperate with the defendant." Note, Prosecutorial Discovery under Proposed Rule 16, 85 Harv. L. Rev. 994, 1018-1019 (1972) (footnotes omitted). *See* Goldstein "The State and the Accused: Balance of Advantage in Criminal Procedure," 69 Yale L.J. 1150, 1173 (1960); Nakell, "Criminal Discovery for the Defense and the Prosecution–The Developing Constitutional Considerations," 50 N. Car. L. Rev. 437 (1972); Brennan, "The

Another primary reason for the imbalance has been the relative ineffectiveness of legal assistance provided the accused in the past.[14] In recent years, concern has led to a higher quality of representation for indigent defendants, but the government's proposal would undermine this development, and further contribute to a system already weighted against the defendant in two respects: 1) it would impair the relationship of trust and confidence between client and attorney and 2) it would inhibit investigators and other members of the defense team from gathering all facts both favorable and unfavorable.

A relationship of trust and confidence between an attorney and his client is the cornerstone of a strong system of criminal justice. American Bar Association Standards admonish defense attorneys to create such a relationship. ABA Standards, The Defense Function, § 3.1(a) (1971). At the same time, the ABA recognizes the special obstacles to the creation of such a relationship in criminal, as opposed to civil, cases. ABA

Criminal Prosecution: Sporting Event or Quest for Truth?" 1963 Wash. U.L.Q. 279 (1963).

The length of time between the alleged crime and the filing of charges allows the memory of the defendant to dim making it difficult for him to retrace his movements. This problem is particularly severe for the unemployed who live relatively unstructured lives and who cannot establish their whereabouts by utilizing business records. The fact that these individuals may lack education and are inarticulate makes the verification of their innocence more difficult. Such individuals constitute a large number of those represented by public defender offices. Finally "Jurors doubtless tend to believe that most indicted persons are guilty, no matter how strongly they are warned otherwise. . ." Friendly, "The Fifth Amendment Tomorrow and the Case for Constitutional Change," 37 U. Cinn. L. Rev. 671, (1968).

[14]See, Bazelon, "The Defective Assistance of Counsel," 42 U. Cinn. L. Rev. 1, 6 (1973).

Standards, The Defense Function, § 2.3 pp. 197-98 (Approved Draft 1971).

When a public defender or other appointed counsel represents a client, the problem is even more severe. Studies show that defendants have a tendency to "regard the public defender as an arm of the state working closely with the prosecutor." *People v. Canfield*, 12 Cal. 3d 699, 705, 117 Cal. Rptr. 81, 85.[15]

Suspicion will only be intensified when a defendant observes his attorney providing the government with information from the reports of his defense investigator. The result will be unwillingness on the part of the client to be candid with his attorney. *See People v. Canfield*, 12 Cal. 3d 699, 705, 117 Cal. Rptr. 81, 85.

Vigorous investigation and effective communication among members of the defense camp will also be negatively affected by the proposed rule.[16] It will

[15]See Wilkerson, "Public Defenders as Their Clients See Them", 1 Am. J. Crim. L. 141, 144 (1972); Casper, *Criminal Justice–The Consumers' Perspective* 23-9 (U.S. Dept. of Justice, 1972); ABA Standards, The Defense Function §2.3, p.198 (Approved Draft 1971) Medalie, Zeitz & Alexander, "Custodial Police Interrogation in Our National's Capital: The Attempt to Implement Miranda," 66 Mich. L. Rev. 1347, 1378 (1968); Comment, "Interrogations in New Haven: The Impact of Miranda," 76 Yale L.J. 1519, 1605 n.244 (1967).

[16]One of the most important assets of a strong public defender office is a permanent staff of full-time investigators who fulfill a number of purposes: (1) they free the attorney's time for necessary legal tasks; (2) for tactical reasons, it may be important that the attorney does not confront the witness until trial; (3) in addition, if impeachment by prior inconsistent statements become necessary, an investigator, not the attorney, should testify, since ethical considerations would require the attorney to withdraw from the case before taking the stand to

encourage the investigator to stop writing reports, or to censor and tailor them so as not to contain information damaging to the defendant.[17] Equally important, fear of eliciting damaging information may inhibit the investigator from conducting thorough interviews, needed to evaluate and to prepare his case. Defense counsel will be unable to bargain effectively with the prosecution, or to intelligently advise his client either to accept a plea bargain or to go to trial. Cross-examination will also suffer.[18] In addition, ignorance about defense witnesses and about government witnesses' version of the case will make difficult the tasks of presenting the best defense witnesses and eliciting from them the most pertinent information.

Cases will be brought to trial that would have been disposed of earlier had the facts been known to the defense attorney. Valuable defenses will be neglected. Trials will be full of surprises for defense counsel causing delays and resulting in inadequate representa-

impeach the witness. ABA Standards Relating to the Administration of Criminal Justice, Compilation, p.126 (1974). *See also*, Freeman, "The Public Defender System", J. Amer. Ind. Soc. 74, 76 (1948); Beany, The Right To Counsel in American Courts, 220 (1955).

[17]Memorializing interviews is viewed as essential to effective trial preparation. Bailey and Rothblatt, *Investigation and Preparation of Criminal Cases Federal and State*, 57 (1970); Amsterdam, Segal and Miller, *Trial Manual for the Defense of Criminal Cases II*, 2-92 (1971).

[18]Necessary preparation for cross-examination requires a complete understanding of the case, the witness' background, his interest in the case, his prejudices, his relation to the parties and counsel, and his prior statements about the case. See L. Friedman, *Essentials of Cross-Examination*, 16 (1968).

tion of defendants. ABA Standards, The Defense Function, § 3.1(a), p. 201 (Approved Draft 1971).

In the instant case, the trial court offered to examine the documents in camera in order to excise irrelevant material. [App. 33] Such a procedure only adds to the problem. A judge should not be privy to material in the defense files which may be damaging to the defendant. It may affect his ability to decide a motion for judgment of acquittal; he may not be able to resist entering upon a line of questioning that would bring out the information he believes important; and finally, it may affect his attitude at the sentencing of a defendant, in the event of a conviction.

Petitioner argues that disclosure of relevant portions of these documents will aid the search for truth. In fact, the interest in truth will not be advanced materially by this proposal. An honest investigator will ordinarily include in his report impeaching statements. A dishonest investigator, such as petitioner is seeking, will just as likely misstate the interview in his report as on the stand under oath.[19] Petitioner's proposal severely undermines the fundamental interest of our adversary system in ensuring the confidentiality necessary for effective preparation of an accused's case. The right to effective assistance of counsel under the Sixth Amendment and the common law doctrine of work product guarantees confidentiality in this case.

---

[19]Contrary to petitioner's implied assertions defense counsel may not under any circumstances knowingly offer false evidence. ABA Standards, Defense Function §7.5(a) (1971). (See Pet. br. 27).

2. A Shield Of Confidentiality Is Part Of The Sixth Amendment Right To Counsel.

The Sixth Amendment entitles a defendant to the effective assistance of counsel "at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 70; *Glasser v. United States*, 315 U.S. 60, 76. Included in the concept of effective assistance of counsel is the presumption that counsel will investigate a case thoroughly and will interview both defense and government witnesses.[20]

Clearly the defense attorney, to carry out these obligations, must work with investigators. They conduct interviews and transmit information and their analysis of it to the attorney. The effective preparation of the defense case requires freedom of communication among members of the defense team. Only if a cloak of confidentiality is placed around them will the gathering of facts and concomitant communication and analysis of them be such as to assure the client effective representation.

As a consequence, the Sixth Amendment is violated when the government becomes privileged to internal

---

[20]*See Powell v. Alabama, supra* at 58; *Griffin v. Illinois*, 351 U.S. 12, 17; *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.) *cert. denied*, 393 U.S. 849; *United States v. Germany*, 32 F.R.D. 421 (M.D. Ala.); *In Re Terkeltoub*, 256 F.Supp. 683, 685 (S.D.N.Y.). *See also United States v. DeCostor*, 487 F.2d 1197, 1203 (C.A.D.C.); ABA Standards Relating to the Administration of Criminal Justice, Compilation, pp. 125, 148 (1974); Criminal Justice Act of 1964, 18 U.S.C. §3006A (1964), as amended, 18 U.S.C. §3006A (Supp. 1972); Note, "Effective Assistance of Counsel for the Indigent Defendant," 78 Harv. L. Rev. 1434, 1438 (1965).

communications of the defense camp. The Sixth Amendment guarantees to a defendant the right to have his investigator and attorney discuss and write reports about interviews of witnesses without running the risk that the government will overhear the conversations or read the reports. *In Re Terkeltoub*, 256 F.Supp. 683, 685 (S.D. N.Y.) citing *Caldwell v. United States*, 205 F.2d 879, *cert. denied* 349 U.S. 930. *See Hoffa v. United States*, 385 U.S. 293, 305-7; *United States v. Kasmir*, 499 F.2d 444, 453 (5th Cir.).

The court in *In Re Terkeltoub, supra*, outlined the Sixth Amendment veil of privacy behind which the government may not go. "At the heart of the job of thorough going investigation and preparation is the interviewing of prospective witnesses, hostile as well as friendly. Because privacy is so vital to these preparatory efforts, the prosecution is forbidden to eavesdrop or plant agents to hear the counsel of the defense." (citations omitted) 256 F.Supp. at 685.

As in the present instance, *Terkeltoub* involved a government attempt, through court order, to have defense counsel reveal the contents of an interview with a witness.[21] The Court, while recognizing there was no surreptitious invasion by an informer, labeled the prosecution effort a "secret intrusion" and emphasized that "the ultimate interest to be protected is the

[21]The defense attorney was subpoenaed to answer questions about a meeting being held with his client and a prospective government witness during the preparatory stages of a case. The witness subsequently reported to the prosecution that the other two participants urged him to commit perjury. *Id.* at 683.

privacy and confidentiality of the lawyer's work in preparing the case." *Id.* at 685.[22]

This Court reiterated these principles in *Hoffa v. United States*, 385 U.S. 293. During the "Test Fleet" trial, a government informer infiltrated the defense camp and reported to the government "at least some of the activities of defense counsel . . . ." *Id.* at 306. The trial ended in a hung jury. The Sixth Amendment issue was raised on appeal from a conviction at a subsequent trial for jury tampering. This Court stated in dicta,

> "The proposition that a surreptitious invasion by a government agent into the legal camp of the defense may violate the protection of the Sixth Amendment has found expression in two cases decided by the Court of Appeals for the District of Columbia Circuit, *Caldwell v. United States*, 92 U.S. App. D.C. 355, 205 F.2d 879, and *Coplon v. United States*, 89 U.S. App. D.C. 103, 191 F.2d 749. Both of those cases dealt with government intrusion of the grossest kind upon confidential relationships between the defendant and his counsel. In *Coplon*, the defendant alleged that government agents deliberately intercepted telephone consultations between the defendant and her lawyer before and during trial. In *Caldwell*, the agent, '[i]n his dual capacity as defense assistant and government agent gained free access to the planning of the defense . . . . Neither his dealings with the defense nor his reports to the prosecution were limited to the proposed unlawful acts of the defense: they covered many matters connected with the impending trial." 92 U.S. App. D.C., at 356, 205 F.2d, at 880.

[22]Since "[t]he testimony sought [dealt] allegedly with a conversation amounting to, or looking toward, the commission of a crime" the reasons for disclosure in *Terkeltoub* were particularly strong. 256 F.Supp. at 684, n.2. *See In Re Grand Jury Proceedings*, 473 F.2d 840, 843 (8th Cir.).

> "We may assume that the *Coplon* and *Caldwell* cases were rightly decided, and further assume, without deciding, that the government's activities during the Test Fleet trial were sufficiently similar to what went on in *Coplon* and *Caldwell* to invoke the rule of those decisions. Consequently, if the Test Fleet trial had resulted in a conviction instead of a hung jury, the conviction would presumptively have been set aside as Constitutionally defective. *Cf. Black v. United States*, ante, at 26." *Id.* at 306-307.

The gravamen of the violation is not interference with the attorney-client privilege.[23] It is the piercing of the shield of confidentiality which surrounds the preparations of the defense camp.

In *Caldwell*, the informer "gained free access to the planning of the defense." 205 F.2d at 880. He sat in on the attorney's conferences with witnesses, other lawyers and defendant. The court concluded that the Constitution's guarantee of effective assistance of counsel loses its meaning "if the government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisors, to listen to their conversations, and to participate in their counsels of defense." *Id.* at 881.

The guarantee loses just as much meaning if those confidential papers are made available to the govern-

[23]In *Hoffa*, the activities of defense counsel included not only conversations with his client but interviewing witnesses, and planning the following day's trial strategy. *Id.* at 304. The court assumed that only "some" of these activities were reported by the informer, indicating that for Sixth Amendment purposes it was not differentiating among them.

ment by order of the court. The violation of the sanctity of defense preparations is the same. Disclosure of portions of the defense report places the government in the camp of the defense with ears to listen to the interview of the witness by the investigator, and eyes to read portions of the confidential report the investigator wrote the attorney.

These cases teach that when the shield of confidentiality which surrounds the defense camp is pierced, a Sixth Amendment violation occurs regardless of whether or not the defense team's preparations were adversely affected. *Hoffa v. United States*, 385 U.S. at 307, *Coplon v. United States*, 191 F.2d at 759; *Caldwell v. United States*, 205 F.2d at 881.

However, as noted in the preceding section of this brief, the government's proposal in fact will have a detrimental impact on the representation afforded defendants.

3. The Work Product Doctrine, Established to Ensure Effective Representation of Clients, Protects the Investigator's Reports from Enforced Production.

The work product doctrine is another means by which the law protects confidential communications of the defense team. The basis on which the doctrine rests is the same as that of the Sixth Amendment shield, and was clearly outlined by this Court in *Hickman v. Taylor*, 329 U.S. 495, 510-11. An attorney's obligation to faithfully represent his client requires that the attorney and his staff work in "privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* Only then can he assemble the necessary

information and competently prepare the case. *Id.* Consequently, the law places a shield of confidentiality around "interviews, statements, memoranda . . . [and] mental impressions" of the defense team. *Id.* at 511.

The relevant portions of the investigator's report constituted defense counsel's work product. As in *Hickman*, production of an oral statement memorialized in an investigator's report was sought. Although *Hickman* involved pretrial discovery, the policy considerations upon which the doctrine rests are just as applicable to discovery during trial.[24]

The court of appeals recognized in this case that although the "policies supporting protection of an attorney's work product [have been] stated with reference to civil litigation, they are even more strongly applicable in criminal proceedings. Pet. App. 16a, n.5 quoting from Annot. 35 A.L.R. 3d 412, 424 (1971)." *In Re Grand Jury Proceedings, Duffy v. United States*, 473 F.2d 840, 846 (8th Cir.).[25] The need for effective

[24]The work product doctrine was not tied to the specific rules involved in the controversy in *Hickman*, but are "well recognized and . . . essential to an orderly working of our system of legal procedure." Id. at 512.

[25]The United States Court of Appeals for the 8th Circuit has stated, "There is 'an especially strong tendency toward the protection of materials as the 'work product' of an attorney in criminal cases.' " Annot. 35 A.L.R. 3d 412, 424 (1971). *In Re Grand Jury Proceedings, Duffy v. United States*, 473 F.2d 840, 846 (8th Cir.); (*See e.g. State v. Bowen*, 104 Ariz. 138, 449 P.2d 603; *State v. Superior Court*, 99 Ariz. 382, 409 P.2d 547; *Fisher v. State*, 241 Ark. 545, 408 S.W.2d 894; *Edens v. State*, 235 Ark. 178, 359 S.W.2d 432; *People v. Boehm*, 270 Cal. App.2d 13, 75 Cal. Rptr. 590; *Urga v. State*, 85 So.2d 629, 630; *Whitaker v. Blackburn*, 74 So.2d 749, 795-96; *See also*, Comment, " 'Work Product' in Criminal Discovery," 1966 Wash. U.L.Q. 321 (1966)).

representation is more important in a criminal case because the liberty of the defendant is at stake. Moreover, if its protections are not available, the tenuous relationship between appointed counsel and indigent client may quickly deteriorate. (*See pages* 25-7, supra).

The Court in *Hickman* noted that work product is not discoverable except in a "rare" situation where there has been a showing of necessity or a claim that undue prejudice to the preparation or conduct of a petitioner's case would result . . . . *Id.* at 513.

However, the privilege given to "the oral statements made by witnesses" as opposed to statements they have written or signed is absolute.[26] Even if a conditional privilege would be applicable to these documents in a civil proceeding, in a criminal case the guidelines must be more stringent. *See, In Re Terkeltoub*, 256 F.Supp. 683, 686 (S.D.N.Y.). That standard should be the one reflected in Rule 16 of the Federal Rules of Criminal Procedure, which unqualifiedly excludes from discovery investigators' reports of interviews with government witnesses.

Moreover, "[g]enerally, if a witness is available to the party seeking discovery of his statement to opposing counsel, such discovery should not be allowed." Annot. 35 A.L.R. 3d 412, 470 (1971); *See Hickman v. Taylor, supra* at 508; *In Re Grand Jury*

[26]"Thus, as to such oral statements, the Court said, 'we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production.' " *Hickman v. Taylor, supra* at 512. C. Wright, *Law of Federal Courts*, § 82 at 362 (2d Ed. 1970) (footnotes omitted); *In Re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir.).

Proceedings, 473 F.2d 840, 849 (8th Cir.). Here the witnesses who allegedly lied were the government's own witnesses. They had already testified for the government and could have been called again in rebuttal. The investigator intended to take the stand and would have been subject to complete cross-examination including impeachment by any legal means. *See Hickman v. Taylor, supra* at 508. Finally, there is no showing in this case that the government made any attempt to interview the investigator prior to the defense case or that it sought a continuance to interview him.

The important interest upon which the work product doctrine is based requires its application to investigators' reports in a criminal case. As this Court has already recognized,

> "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate would not be his own. Inefficiency, unfairness, and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Hickman v. Taylor*, 329 U.S. 495, 511.

C. THE COURT OF APPEALS PROPERLY HELD THAT THE TRIAL COURT'S ORDER VIOLATED RESPONDENT'S PRIVILEGE AGAINST SELF-INCRIMINATION

1. The Document Was Personal To Respondent And Testimonial Within The Meaning Of The Privilege Against Self-Incrimination.

The court of appeals found correctly that the Fifth Amendment's privilege against self-incrimination prohibited government discovery of portions of the defense investigator's report (Pet. br. 14a). *See United States v. Wright*, 489 F.2d 1181, 1195 (C.A.D.C.).

The Fifth Amendment protects the accused from "being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . ." *Schmerber v. California*, 384 U.S. 757, 761.

Relying on the distinction set forth in *Schmerber v. California, supra* at 764, petitioner claims that the reports are not communicative or testimonial. [Pet. br. 46-7]. The reports, however, are not a source of "real or physical evidence", such as a blood test or police lineup. *Schmerber v. California, supra; Gilbert v. California*, 388 U.S. 263, 270; *United States v. Wade*, 388 U.S. 218, 222. Instead, the prosecutor "intended to rely on [their] substantive content for evidence or leads, rather than upon some physical attribute of the paper or writing." Note, "Prosecutorial Discovery Under Proposed Rule 16," 85 Harv. L. Rev. 994, 1003 (1972).

The relevant portions of the report reflect the thought processes of the investigator on several levels. First, he selected and analyzed the material in his

reports. In addition, his mental efforts contributed to the interview itself, including the wording of his questions, the framework within which they were asked, and the general mood of the interview.[27] Thus, contrary to petitioner's assertion, the writings sought were materially different from a "tape recording of the interview or from purely physical evidence that may have been uncovered by Bond in the course of the investigation." [Pet. br. 47].

Petitioner claims that even if the portions of the report might be testimonial ". . . as applied to a claim of privilege by Bond, the report cannot be considered 'testimonial' in connection with respondent's claim." *Id.*

"The privilege protects the individual from any disclosure, in the form of oral testimony, documents, or chattels, sought by legal process against him as a witness." *United States v. White*, 322 U.S. 694, 699. "Where one's private documents would tend to incriminate him, the privilege exists although they were actually written by another person." *Wilson v. United States*, 221 U.S. 361, 378.[28]

The testimonial disclosure implicit in documents which do not include a defendant's statements is the "witness' assurance compelled as an incident of the process, that the articles produced are the ones demanded. . . ." 8 Wigmore, *Evidence* § 2264 at 380

---

[27]Insofar as the investigator is influenced by conferences with the attorney prior to the interview, the attorney's thought processes also contribute to the results.

[28]*Boyd v. United States*, 116 U.S. 616, 638; Mansfield, "The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information." 1966 The Supreme Court Review 103, 127.

(McNaughton Rev. 1961). One of the underlying policies of the privilege as defined by this Court is "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt. . . ." *Murphy v. Waterfront Commission*, 378 U.S. 52, 55. This "trilemma" is faced whenever the government forces a defendant to produce a document, regardless of whether the document contains his statements or the statements of other witnesses.[29]

Petitioner has confused the requirement that the documents be held in a "personal capacity" with the requirement that they be "testimonial" or "communicative". Although the defendant works through his attorney and investigators, they are his agents and

---

[29]"He can produce the sought after document, thereby implicitly stating that the document produced is the one requested, and provide evidence against himself. He can perjure himself in two ways: he can refuse production on the ground that he does not have the requested item, or he can produce something other than the document requested – for example, a forged non-incriminating version of the document. Or he can simply refuse production and subject himself to a contempt sanction. Compelled production of a document in the possession of the defendant, whether or not it is a document written by the defendant, thus involves a "communicative act" by the defendant within the protection of the privilege. '[I]t is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit.' *Couch v. United States, supra*, 409 U.S. at 330 n.12, 93 S.Ct. at 617 quoting *United States v. Cohen*, 9th Cir. 338 F.2d 464, 468 (1967) *United States v. Wright*, 489 F.2d 1181, 1193-4, n.15 (D.C. Cir. 1973). See also, *United States v. White*, 322 U.S. 694, 699; *In Re Grant*, 198 F.708, 709 (S.D.N.Y.) (Hand, J.); affirmed, 227 U.S. 74.

extensions of him. *United States v. Judson,* 322 F.2d 460, 467 (9th Cir.); 8 Wigmore, *Evidence,* §§2270, 2307 (McNaughton Rev. 1961). Moreover, they all share a "pre-existing relationship of confidentiality." *Bellis v. United States,* 417 U.S. 85, 101. As a consequence, respondent had rightful possession of the documents in a "purely personal capacity", instead of in a "representative" capacity on behalf of a "collective entity" such as a corporation or partnership. *Bellis v. United States,* 417 U.S. 85, 88, 90. *United States v. White,* 322 U.S. 85, 88, 90; See *Couch v. United States,* 409 U.S. 322, 335.

Although not required by the claim of privilege, the report must be viewed in the same light as if respondent himself had written it. Otherwise, an intolerable tension arises between respondent's Fifth Amendment right and his right to counsel under the Sixth Amendment. A defendant who is not represented by an attorney may himself investigate the case and prepare his own investigative reports. If these reports are shielded from discovery by the privilege against self-incrimination, but those of a defendant receiving the traditional benefits of counsel are not so protected, the defendant represented by counsel is penalized. The unconstitutional tension is created when respondent is forced to choose whether to forego benefit of counsel in order to protect documents by asserting his Fifth Amendment privilege, or to make his documents vulnerable to perusal by the prosecution in order to have the benefit of counsel. *See Simmons v. United States,* 390 U.S. 377, 392.

2. Respondent Was "Compelled" To Disclose The Contents Of The Report Within The Meaning Of The Fifth Amendment; At No Time Did He Waive His Privilege Against Self-Incrimination.

Although the court's order forced respondent to choose between surrendering of the report and presentation of the testimony of his major witness, the government suggests there was no "compulsion" in the instant case. Where the choice, as here is, " 'between the rock and the whirlpool', duress is inherent in the decision to 'waive' one or the other". *Garrity v. New Jersey,* 385 U.S. 493, 498. Compulsion was particularly serious in this case because petitioner was forced to choose between the exercise of his Fifth Amendment right to silence on the one hand, or his Sixth Amendment rights to compulsory process of defense witnesses and confrontation of government witnesses. *See* pp. 49-52 *infra.* Such a choice was condemned in *Simmons v. United States,* 390 U.S. 377, when this court concluded, "... we find it intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394.

This court traditionally has been solicitous about the Fifth Amendment rights of defendants and has refused to allow the government to obviate those rights by indirection and manipulation.[30] In this case, respondent

---

[30] *Boyd v. United States*, 116 U.S. 616, 634 (1886) (in a civil forfeiture action, court would not condone the choice between producing a document or forfeiting his goods); *Slochower v. Board of Education*, 350 U.S. 551, 559 (public school teacher cannot be discharged merely because he invoked Fifth Amendment); *Garrity v. New Jersey, supra* at 498 (policeman cannot be forced to choose between his job and taking the

paid doubly for exercise of his Fifth Amendment right against self-incrimination. Not only was he forced to forfeit valuable testimony guaranteed him under the Sixth Amendment, but he also suffered irreparable prejudice when the prosecutor called the jury's attention to respondent's failure to produce that testimony.[31]

Petitioner's reliance on this Court's approval of an alibi statute in *Williams v. Florida*, 399 U.S. 78, 82 is misplaced. In *Williams*, the defendant was required to produce, prior to trial, evidence he would have introduced during the trial—the fact that the defense would rely on an alibi and the names of the alibi witnesses. The statute only affected the timing of the disclosure; here respondent never intended to introduce any part of John Bond's report.[32]

Furthermore, the policy reason, avoidance of undue surprise, which justified discovery of the alibi defense and the names of alibi witnesses in *Williams*, is simply

---

Fifth); *Spevack v. Klein*, 385 U.S. 511, 516 (attorney cannot be disbarred because he invoked Fifth Amendment protections); *Brooks v. Tennessee*, 406 U.S. 605, 610-611, (rule requiring that defendant be first in order of defense witnesses 'cuts down on the privilege [to remain silent]', *Lefkowitz v. Turley*, 414 U.S. 70, 85 (Waiver of privilege secured under the threat of substantial economic sanction cannot be termed voluntary) *Griffin v. California*, 380 U.S. 609, 614 (comment on a defendant's silence at trial "cuts down on the privilege by making its assertion costly.")

[31] See page 61, infra.

[32] Respondent did not object to revealing the fact that it intended to put on an impeachment witness or the name of that witness.

inapplicable to the discovery of an investigator's report in this situation.[33]

Finally, *Williams* was a case in which the rulemakers had authorized disclosure of alibi witnesses. In the instant case, on the other hand, the rulemakers not only have refused to authorize the discovery of defense investigator reports, they have expressly prohibited such discovery. *See* pp. 13-23 *supra*.

Likewise, the holding in *McGautha v. California*, 402 U.S. 183 offers no support for petitioner's position. There, the petitioner was tried before a jury which determined both his guilt and punishment in one proceeding. The Court analyzed the burdens of a defendant who wants to testify on the issue of punishment, but not on the issue of guilt. This Court rejected petitioner's argument that he had been subjected to an unconstitutional choice proscribed by *Simmons v. United States*. The distinguishing feature in *Simmons*, according to this Court, was that the benefit "to be gained by waiving the Fifth Amendment privilege is that afforded by another provision of the Bill of Rights." *Id.* at 212, quoting *Simmons v. United States*, 390 U.S. 377, 394. Respondent Nobles'

---

[33] First, the defense never knows whether it will call an impeaching witness until the government witness takes the stand at trial and testifies in a manner which is inconsistent with his prior statement. Second, the benefit to the government derived from an opportunity to investigate an alibi defense is not ordinarily a valid consideration when dealing with impeachment testimony. Such evidence is not susceptible to the kind of on-the-scene investigation which law enforcement officers often conduct when confronted with the contention that defendant was at another place when the crime occurred.

situation is analogous to that of the defendant in *Simmons*, since he could have secured his Sixth Amendment right to present John Bond's testimony by waiving his privilege. The defendant in *McGautha* was in no such position; this Court found his dilemma similar to that of a defendant who by taking the stand subjects himself to the burdens of cross-examination and impeachment. *Id.* at 215. "[I]t is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh the pros and cons in deciding whether to testify." *Id.* at 215. But respondent Nobles' position is quite different. When he chose to exercise his right to remain silent, he was not only prevented from taking the stand himself, but was also forced to forego the testimony of another witness, his investigator.[34]

Petitioner's argument that respondent waived his right to be silent as to the reports by placing the investigator on the stand is mistaken. Respondent never took the stand. If he had an otherwise valid Fifth Amendment claim to the reports, it was not waived merely because he offered the testimony of his investigator who wrote the reports and would testify to related events.

Respondent agrees with the principle relied on by petitioner that if a defendant takes the stand he opens himself to cross-examination. In the instant case, the investigator, not the defendant, took the stand, and the

---

[34]Conversely, if respondent had exercised his constitutional right to place the witness on the stand, the court's order would have forced him to surrender his privilege against self-incrimination, although he never took the stand.

government was free to thoroughly cross-examine him. Any prior inconsistent statements made orally or in writing to government agents or to individuals outside the defense camp clearly could have been utilized to impeach him. *Cf. Harris v. New York*, 401 U.S. 222, 225. But cross-examination, just as other means of presenting evidence, is subject to limitation by principles of confidentiality based on common-law privileges and on the Constitution.

Similarly inapplicable is this Court's opinion in *Harris v. New York, supra*, relied on by petitioner. In *Harris* the defendant himself took the stand, but continued to press a Fifth Amendment claim. Moreover,

> "[i]t is one thing to allow the fruits of a constitutional violation to be used, for cause, after it has occurred outside the trial court. It would be quite another matter to permit it to occur at the hands of the court itself. . . ." *People v. Bais*, 31 Cal. App. 3d 663, 675, 107 Cal. Rptr. 519, 528.

Finally, this Court noted that the policy interest involved in the Fifth Amendment exclusionary rule, deterrence of police misconduct, was not impaired by the use of the statement in *Harris*, since "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." 401 U.S. at 225. In the instant case, on the other hand, the court's order significantly impaired the policy interests involved in respondent's choice to surrender either his Fifth Amendment privilege against self-incrimination or his Sixth Amendment right to compel production of witnesses and cross-examine government witnesses.[35]

---

[35]The Sixth Amendment interest involved is the right of an accused to defend himself actively. Unquestionably that interest was impaired. *See* pp. 49-52 *infra*.

Two of the most important interests upon which the Fifth Amendment privilege is based were significantly impaired by the Court's order.[36] First, respondent was subjected to the "cruel trilemma" when he was ordered to surrender portions of John Bond's reports. *Murphy v. Waterfront Commission*, 378 U.S. 52, 55; *See* pp. 39-40 *supra*. Second, the government was relieved of the responsibility of shouldering the "entire load" of proof when it was granted access to portions of John Bond's reports. *Id. See* pp. 17-18 *supra*.[37]

The burden of the government does not end, as petitioner urges, at the close of its case in chief. (Pet. br. 56-7). Otherwise, "a defendant's constitutional privilege against self-incrimination is suspended at a given point in his trial." *People v. Bais*, 31 Cal. App. 3d 663, 672, 107 Cal. Rptr. 519, 525.[38]

---

[36]The interest in privacy was also significantly impaired. See e.g. *Murphy v. Waterfront Commission*, 378 U.S. 52, 55. This Court's emphasis on the importance of an expectation of privacy suggests that this interest is at stake when the confidential relationship of an individual with his agents is violated. See *Bellis v. United States*, 417 U.S. 85, 101; *Couch v. United States*, 409 U.S. 322, 335.

[37]*Tehan v. United States ex rel. Shott*, 382 U.S. 406, 415-6. See e.g. *Murphy v. Waterfront Commission*, 378 U.S. 52, 55; *Ullmann v. United States*, 350 U.S. 422, 427-28; *United States v. White*, 322 U.S. 694, 698; *Bram v. United States*, 168 U.S. 532, 542. *See* McKay, "Self-Incrimination and the New Privacy." 1967 The Supreme Court Review, 193, 206-14.

[38]The State Court of Appeal in *Bais* held that the trial court erred in ordering disclosure of defense investigators' reports during the defense case for impeachment purposes. 31 Cal. App. 3d 663, 107 Cal. Rptr. 519 The court of appeal in *Bais* as did the court of appeals in Nobles, correctly relied on the California Supreme Court's decision in *Prudhomme v. Superior Court of*

The government's burden to "investigate its own case, find its own evidence, and prove its own facts" can conceivably be lightened by information secured from the defendant, after the close of its case in chief. This information may be used during reopening of its case in chief, as ammunition for cross-examination of defense witnesses, as the basis for new testimony by its own witnesses in rebuttal, or as a lead to be exploited at a new trial. *See United States v. Wright*, 489 F.2d at 1195.

The privilege against self-incrimination extends not only to testimony which may be conclusive on the issue of guilt, but also to information which might furnish "a link in the chain" against the accused. *Hoffa v. United States*, 385 U.S. 293, 304 n.7 *Hoffman v. United States*, 341 U.S. 479, 486.

A defendant, in order to invoke the privilege, need make no showing that the document sought is incriminating, "for the very fact that the prosecution seeks it establishes that in the prosecution's view, it may be incriminating." *Jones v. Superior Court*, 58 Cal. 2d 56, 60, 22 Cal. Rptr. 879, 881. *See Miranda v. Arizona*, 384 U.S. 436, 460.

"Constitutional provisions for the security of person and property should be liberally construed. . . ." *Boyd*

Los Angeles County, 2 Cal. 3d 320, 466 P.2d 673. (Pet. App. 10a-12a). Rejecting petitioner's interpretation of *Prudhomme*, the court in *Bais* stated,

> "The court's use of the reference to case-in-chief may not be construed to mean that a discovery cannot 'lighten the prosecution's burden,' in the constitutional sense, for the sole reason that it occurs after the prosecution has rested. . . . The *Frudhomme* court's full discussion of the privilege precludes such reasoning. . . ." 31 Cal. App. 3d at 672, 107 Cal. Rpt. at 525. (Pet. br. 56-8)

v. United States, 116 U.S. 618, 635 (1886). Consequently, "[t]he privilege has been broadly construed." *Maness v. Meyers,* ____ U.S. ____, 95 S. Ct. 584, 592; See *Spevack v. Klein,* 385 U.S. 511, 515. The government's proposal is seductive, but "[T]hose who framed our constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that 'illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.' *Boyd v. United States,* 116 U.S. 616, 635." *Miranda v. Arizona,* 384 U.S. 436, 459.

As a result, they made the privilege "as broad as the mischief against which it seeks to guard." *Id.,* at 459-60. The court of appeals correctly recognized that the entire investigator's report fell within that privilege.

D. THE SANCTION OF PRECLUSION WAS IMPROPER IN THAT IT VIOLATED RESPONDENT'S CONSTITUTIONAL RIGHTS TO COMPULSORY PROCESS AND CROSS-EXAMINATION OF WITNESSES

After defense counsel advised he would not surrender portions of the investigator's reports, the trial court precluded defense counsel from offering testimony of the investigator which would impeach the eyewitnesses. In so doing, the court denied respondent the right to present witnesses in his own behalf, and also prevented respondent from completing cross-examination of the two government eyewitnesses.

1. Respondent Was Denied The Right To Compulsory Process Guaranteed By The Sixth Amendment When He Was Not Permitted To Present The Testimony Of His Investigator

The Sixth Amendment to the United States Constitution provides, in pertinent part, that,

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."

Common law rules prohibited large categories of witnesses from testifying for the defendant including the accused himself on the grounds that these strictures would ensure truthfulness of testimony.[39]

The framers of the Constitution, as well as this Court, have repudiated the common law rule since,

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas,* 388 U.S. 14, 19; *United States v. Burr,* 25 F.Cas. 30, 32 (No. 14, 692d) (C.D. Va.)

As a consequence, this Court held unconstitutional a Texas statute which rendered co-indictees incompetent to testify for one another, since,

---

[39] "Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of the oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors", *Benson v. United States,* 146 U.S. 325, 336.

> "... the State arbitrarily denied defendant the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." *Washington v. Texas,* 388 U.S. 14, 23. *See* Westen, "The Compulsory Process Clause" 73 Mich. L. Rev. 71, 108 - 117 (1974).

In presenting the testimony of his investigator, respondent had as strong an interest as did the defendant in *Washington v. Texas.* The accomplice in *Washington* offered to testify that the defendant did not shoot the victim; the investigator offered to testify that the two eyewitnesses who testified against defendant had admitted facts which cast severe doubt on their credibility. In each case, if believed, the testimony would have altered the outcome of the trial in favor of the accused.[40]

When the defendant is denied an opportunity to present material and exculpatory impeachment evidence through the fault of the Government, defendant's fundamental right of due process is denied. *Giglio v. United States,* 405 U.S. 150, 153. Here, the court order denied respondent the opportunity to present impeaching testimony, an act which in effect was as

[40]This court's recent opinion in ***Estelle v. Durrough,*** ____U.S. ____ (Mar. 17, 1975), 43 U.S.L.W. 3497 (Mar. 18, 1975) is distinguishable from this case, because defendant in *Estelle* had no Constitutional right to appeal.

serious as if the government had failed to make known to the defendant exculpatory impeachment evidence in its possession. *See Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). If anything, the fact that a specific clause of the Sixth Amendment rather than the "general 'fairness' approach" of the due process clause is at issue, warrants application of a stricter standard of review in this case.[41]

2. The Court's Order Forbidding The Investigator From Testifying As To The Prior Inconsistent Statements Of Government Witnesses Denied Respondent The Right Of Cross-Examination

The right to cross-examine witnesses is guaranteed by the confrontation clause of the Sixth Amendment and has been labeled a "fundamental right", essential to a fair trial. *Pointer v. Texas,* 380 U.S. 400, 403; *See Bruton v. United States,* 391 U.S. 123, 126; *Kirby v. United States,* 174 U.S. 47, 55. As this Court has stated, "... certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." *Pointer v. Texas,* 380 U.S. 400, 404; *Smith v. Illinois,* 390 U.S. 129, 131. An integral part of cross-examination is the opportunity of the cross-examiner to impeach the credibility of a witness.

[41]In construing the due process clause, the courts apply a more lenient standard of review. *Spencer v. Texas*, 385 U.S. 554,565. See also *Donnelly v. DeChristoforo*, 416 U.S. 637,643; *United States v. Augenblick*, 393 U.S. 348, 356; *Ashe v. Swenson*, 397 U.S. 436, 442-43.

Among the various kinds of impeaching evidence, none is more effective than a prior inconsistent statement. *See Harris v. New York*, 401 U.S. 222, 225. When, as in the instant case, the prior inconsistent statement is in the form of an oral statement made to another individual the culmination of the impeachment occurs when the individual who heard the statement takes the stand as a defense witness and testifies to it. In this case, that individual, John Bond, was not permitted to testify.[42]

> "... Prejudice ensued from a denial of the opportunity to place the witnesses in their proper setting and put the weight of their testimony and their credibility to a test, without which the jury could not fairly appraise them ...." *Alford v. United States*, 282 U.S. 687, 691, 692; *Smith v. Illinois*, 390 U.S. 129, 132.

3. The Governmental Interests In Disclosure Of The Relevant Portions Of The Reports Did Not Justify The Penalty Of Forbidding Respondent The Right To Offer The Impeaching Testimony Of The Investigator

This Court has twice faced, but twice avoided, the decision as to whether the preclusion sanction is valid in light of its burden on a defendant's rights under the

[42]Respondent's right to the effective assistance of counsel guaranteed by the Sixth Amendment was also burdened by the court's order. The right to effective assistance of counsel includes the right to have counsel or his agents investigate the case. See p. 29 supra. Because counsel was not permitted at trial to present the material and relevant evidence uncovered by the investigator, that right was rendered meaningless.

compulsory process clause of the Sixth Amendment. *Wardius v. Oregon*, 412 U.S. 470, 472 n.4; *Williams v. Florida*, 399 U.S. 78, 83, n.14.[43]

The government's interest in disqualifying the investigator is two fold: first, the elimination of testimony which might possibly be unreliable, and second, penalization of the defendant for violation of a court order.

(a) Government's interest in screening out unreliable testimony.

The government has an interest in ensuring the reliability of testimony. Therefore, it could be argued that the investigator's notes would serve as a means of establishing his reliability, and that in their absence, his testimony was too dubious to be received. A similar argument was made and rejected in *Washington v. Texas*, 388 U.S. at 22; see pp. 50-1 *supra*. This Court did not deny that a co-indictee's testimony might be biased, perjured, and unreliable; nor did it deny that the state had a valid interest in protecting the judicial process from infection by unreliable testimony. Preclusion, however, imposed an unnecessary burden on

[43]Respondent raised, though inartfully, the issue of the appropriateness of the preclusion sanction at trial. [App. 34-5] In addition, he made the argument both in his brief before the court of appeals and in his brief in opposition to the petition for writ of certiorari in this Court, that he was denied his Sixth Amendment right to cross-examine defense witness when the court precluded the testimony of John Bond.

the Constitutional right to present a defense.[44] This Court stressed the overriding importance of the right to compulsory process, and,

> "the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, securing the credit and weight of such testimony to be determined by the jury or by the Court. . . ." *Rosen v. United States,* 245 U.S. 467, 471. *Washington v. Texas,* 388 U.S. at 22.

More recently, an argument similar to that of the government's in *Washington v. Texas* was rejected in *Brooks v. Tennessee,* 406 U.S. 605. Brooks was precluded from calling himself as a witness, because to have done so would have violated a Tennessee statute requiring that defendant take the stand prior to any other defense witnesses. The statute was based on a belief that the defendant in a criminal proceeding is an unreliable witness, tending to tailor his testimony to the testimony of witnesses who have gone before him. This Court did not deny that defendants may be unreliable witnesses or may tailor their testimony to fit what their other witnesses have said, nor did the Court deny that Tennessee had a valid interest in eliminating unreliable testimony. *Id.* at 611. Rather, the Court held that

[44]Alternative remedies which would have satisfied the Government's interest were available in *Washington*. For example, the Court could have allowed the co-indictee's testimony to be admitted under cautionary instructions to the jury. *See* Westen, "The Compulsory Process Clause," 73 Mich. L. Rev. 71, 115-16 (1974).

> "Pressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty." *Id.* at 611.[45]

In the instant case, there was a greater likelihood of precluding reliable testimony. In *Washington,* the witness had already been convicted and sentenced for murder, and the incentive to help a friend by exonerating him would have been strong. Similarly, the witness in *Brooks* had already heard the testimony of his own witnesses, so that the desire to be found innocent would have made it difficult to ignore that testimony in the framing of his own. Here, on the other hand, the witness withheld his prior notes not because the notes embarrassed him, but on the good faith advice of respondent's counsel that the notes contained information legally protected from disclosure.

(b)Government's interest in punishing respondent for violation of court order.

The government has an interest in ensuring respect for court orders. Even if the testimony of the investigator was reliable, it might be argued that the court was justified in penalizing the respondent for his intended refusal to obey a court order. Preclusion, however, is never an appropriate sanction for a party who acts in good faith.

[45]This Court held that the statute violated defendant's Sixth Amendment right to counsel and his Fifth Amendment privilege against self-incrimination.

In *Societe Internationale v. Rogers*, 357 U.S. 197,[46] the Court held that in light of the serious Constitutional questions raised by depriving a party of the right to put on his case, the sanction of preclusion should apply only to non-disclosure based on "willfulness, bad faith, or . . . fault." *Id.* at 212.[47]

Because of a good faith belief that his position was supported by case, statutory and Constitutional laws, respondent in the instant case did not produce the material sought. It is immaterial that the trial court ruled that the document was unprotected, since respondent had a right to appeal the ruling. *See United States v. Costello*, 222 F.2d 656, 662 (2d Cir.); 4 J. Moore, *Federal Practice*, § 37.03 at 37-69 (2d ed. 1974). If anything, the burden on respondent to justify his avoidance of the sanction of preclusion should not be as heavy as was imposed in *Societe Internationale*.

[46]Plaintiff, a Swiss corporation, sued the United States. The Government responded by moving under Rule 37 of the Federal Rules of Civil Procedure, to discover certain documents. Plaintiff had possession of the documents but feared that revealing them would subject it to prosecution in Swiss courts for disclosure of confidential documents; Plaintiff refused to surrender the documents, the court refused to permit plaintiff to present its case, and entered a default judgment in favor of the government. In both *Societe Internationale* and in this instance, the party was deprived of the opportunity to present evidence on a substantive issue. *See United States v. Bell*, 506 F.2d 207, 222 (D.C. Cir.); *United States v. Seegar*, 180 F.Supp. 467, 468 (S.D.N.Y.); 8 C. Wright & A. Miller, *Federal Practice and Procedure*, §2283 at 763 (1970). Note, "Proposed 1967 Amendments to the Federal Discovery Rules, 68 Col.L.Rev. 271, 292 (1968).

[47]*See also, Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 341-42; *Hovey v. Elliott*, 167 U.S. 409, 429; *Haney v. Woodward & Lothrop, Inc.*, 330 F.2d 940, 946 (4th Cir.).

Respondent is a defendant in a criminal case, instead of the plaintiff in a civil suit, and was brought into court involuntarily to undergo the risk of losing his liberty. In addition, the Court's order violated specific Constitutional guarantees of the Sixth Amendment instead of the general fairness provision of the 5th Amendment.[48] See note 41 *supra*.

(c) The Court erred in not applying effective alternative sanctions which would not have deprived defendant of the investigator's testimony.

The right to compel testimony and cross-examine witnesses guaranteed by the Sixth Amendment is a fundamental right essential to a fair trial. *Pointer v. Texas*, 380 U.S. at 403. Fundamental rights may be infringed upon only in a least restrictive manner. *See San Antonio School District v. Rodriguez*, 411 U.S. 1, 51; *Shelton v. Tucker*, 364 U.S. 479, 488. Consequently, utilization of the preclusion sanction to achieve the valid purposes of counteracting unreliable testimony and upholding the authority of the court is improper when less drastic means are available.

Assuming the court's order to disclose the relevant portions of the report was valid, the court should have employed a lesser sanction. The court could have explained to the jury that the investigator had written a

[48]*Cf. United States v. Reynolds*, 345 U.S. 1, 12. Thus, if preclusion is an excessive sanction under the due process clause, it is certainly excessive under the stricter standards of the compulsory process and confrontation clauses.

report of the interview, but would not surrender it despite a court order. Conceivably the court might state its opinion of the evidence. See E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions: Civil and Criminal* § 80.05 (2d ed. 1970). In addition the court could have framed appropriate instructions to the jury; for example, in judging the investigator's credibility, the court could have instructed the jury to weigh the failure to produce the reports against him.[49] The court could have permitted government counsel to comment on respondent's refusal to obey the court order; such comment by the prosecutor, whether or not accompanied by similar comments or instructions by the court, could have a devastating impact on defendant's chances of winning. *See generally, Griffin v. California,* 380 U.S. 609, 614.[50]

Not only did the preclusion sanction violate respondent's Constitutional rights, but more fundamentally, it constitutes a conscious distortion of the fact-finding process[51] and "threatens to permit the conviction of an individual who is innocent of the crime for which he is charged because of his commission of a separate wrong. . ." – the failure to

---

[49]*See generally, Carranza-Chaidez v. United States*, 414 F.2d 503, 505 (9th Cir.); E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions: Civil and Criminal* §11.34 (2d Ed.1970)

[50]"The Preclusion Sanction–A Violation of the Constitutional Right to Present a Defense," 81 Yale L. J. 1342 (1972).

[51]*See* Weinstein, "Some Difficulties in Devising Rules for Determining Truth in Judicial Trials," 66 Col. L. Rev. 223, 237 (1966).

comply with court ordered discovery. Thus, imposition of the preclusion sanction in this case conflicts with "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." "The Preclusion Sanction," 81 Yale L.J. at 1361 (1972). In light of these considerations, the trial court should have considered and applied an alternative sanction.[52] Its failure to do so warrants affirmance of the judgment of the court of appeals.

II.

THE MISCONDUCT OF THE PROSECUTOR CONSTITUTES A SEPARATE GROUND UPON WHICH THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED.[53]

A. THE PROSECUTOR MISLED THE JURY AS TO THE REASONS JOHN BOND DID NOT TESTIFY TO THE IMPEACHING STATEMENTS OF THE EYEWITNESSES.

The defense investigator, John Bond, was prepared to take the stand and testify that one of the eyewitnesses had told him that all blacks look alike, and that the other eyewitness had told him that he had seen only the back of the robber standing under the surveillance

---

[52]See also, Advisory Committee Note to Rule 612, Fed. R. Evid., 56 F.R.D. 277-78.

[53]The court of appeals found that the prosecutor's conduct did not require reversal. [Pet. App. 18a]

camera. The prosecutor was aware of this fact, and knew that the court had precluded John Bond from so testifying because of a legal disagreement concerning the privileged status of investigators' reports. Nevertheless, the prosecutor reinforced and cultivated a false impression of defense irresponsibility by (a) his continual reference, in the presence of the jury, to the existence of defense investigative reports and of his right to them [e.g. App. 11, 13, 14], (b) his misstatement, in the presence of the jury, that the defense attorney misquoted "the evidence and what this witness (Van Gemeren) told Mr. Bond on that occasion," [App. 15] (c) his allegation, in the presence of the jury, that investigator Bond's interview with witness Hoffman was "highly irregular" [Tr. 403][54] (d) his statement in closing argument that investigator Bond was trying to "pull the wool over [their] eyes," [App. 37, 41] and (e) especially, by his comments in closing argument, to which defense counsel noted his objection, that:

> "In regard to what Mr. Bond did or did not do in this case, there has been a little attempt in this case to introduce some racial remarks of some nature in regard to Mr. Hoffman's testimony. Mr. Bond never testified in the trial as to anything Mr. Hoffman did or did not say to him.
>
> "Mr. Hoffman, you heard his testimony, and I submit to you he denied the questions, said, 'No',

[54]The prosecutor was referring to fact that the interview was held over the telephone. Bond had asked to meet with Hoffman, but Hoffman had replied that his business schedule made a meeting impossible. Hoffman then agreed to be interviewed by telephone. [Tr. 402-3]

> to the questions that were asked by Mr. Allis. If he testified any differently Mr. Bond would have testified in the courtroom to you as to what the inconsistencies were, and Mr. Bond did not so testify. You heard his testimony." [App. 41]

B. THE PROSECUTOR IMPROPERLY INTIMATED THAT AN INDEPENDENT DETERMINATION OF DEFENDANT'S GUILT HAD BEEN MADE PRIOR TO TRIAL, AND IMPROPERLY EXPRESSED A PERSONAL OPINION AS TO THE HONESTY OF GOVERNMENT WITNESSES.

During closing argument, the prosecutor stated,

> "You know, ladies and gentlemen, Darrell MacIntyre didn't bring this particular indictment. This indictment was brought by the Grand Jury of the Central District of California, and you will have a copy with you. Of course, I have a personal interest in this case, that interest being to see that justice is done, and to see that witnesses come in this courtroom and testify under oath as to the truth of what happened.
>
> . . . Audie Murphy was just a plain, common man, and yet in the World War he won the Medal of Honor. He didn't want to do what he had to do, but he did it.
>
> . . . .
>
> . . . Mr. Hoffman is just a citizen, just a person like any one of you . . . He looked at Robert Nobles, he came into this courtroom, under oath, in front of Almighty God, and he said, "That's the man that was standing underneath the camera.' He has no motive to lie.

When I prepared this case with the help of the F.B.I., I don't bring puppets into this courtroom. I don't have any control over their thinking. . . . They testify under oath.

If it wasn't the man that he saw under that camera, he would have said it wasn't. It is just as simple. They are people trying to tell the truth. [App. 38-9]

. . . .

Mr. Allis: Objection, your Honor. . .

The Court: All right. Let's proceed, Mr. MacIntyre.

Mr. MacIntyre: You know, ladies and gentlemen, when the shoe gets tight the foot starts to squirm, and we've got some squirming feet over here. [Tr. 40]

. . . .

. . . I submit to you he [Hoffman] would not, under oath, say that that is the man if he wasn't sure in his mind that it was. No question about it. [Tr. 742]

. . . .

[John Bond] is trying to pull the wool over your eyes by telling you that these are the lighting conditions in the bank in these photographs. That is the biggest bunch of baloney I have ever heard in my life. . .

. . . .

Ladies and gentlemen, if you run with the hounds you can't complain when you wake up with the fleas. [App. 40]

. . . .

All the F.B.I. has done in this case, ladies and gentlemen, is to investigate it properly to bring you the people they felt were necessary witnesses.

And they have testified under oath as to the truth in this case. To attack the F.B.I. I think is just spitting in the wind, because these young men have nothing to do but to honestly and intelligently investigate these cases and bring you the witnesses." The F.B.I. has done their job in this case. We ask you to do your job." [App. 41]

The prosecutor's argument suggested to the jury that a determination of guilt had been made before trial by the grand jury, the F.B.I. and the prosecutor. The grand jury, independently of the prosecutor, had charged the defendant, and the F.B.I. had "done their job" in "honestly and intelligently" investigating the case. Finally, the prosecutor took "a personal interest in the case" in order to see that the witnesses told the truth, that justice was done, and that the right man was convicted. The damaging effect of these remarks was aggravated by the court's instruction (to which defense counsel objected) that, "The indictment in this case returned by the Grand Jury for the Central District of California charges as follows. . ." [Tr. 763-4] See *Hall v. United States*, 419 F.2d 582 (5th Cir.)

The prosecutor's statements also constituted introduction of facts which were not in evidence. *McMillian v. United States*, 363 F.2d 165, 168 (5th Cir.) Finally, the assurance expressed by the prosecutor that he was personally interested in seeing that the witnesses tell the truth, juxtaposed against his emphatic declarations that the eyewitnesses were telling the truth and his comparison of Hoffman to a war hero, represented a personal opinion as to the truth of the testimony of the government witnesses and was improper [App. 39]. *See Hall v. United States, supra*, ABA Standards, *The Prosecution Function*, § § 5.8, 5.9 (1971).

C. THE PROSECUTOR CONTINUALLY MISSTATED THE EVIDENCE

1. The Prosecutor Interrupted Cross-Examination Of The Government Witnesses To Misstate Their Testimony In The Presence Of The Jury.

Van Gemeren testified that he saw the side and back of the man under the surveillance camera and admitted that the man's back was toward him "most of the time." [App. 9] Despite this testimony, the prosecutor rose to his feet to make an objection and stated in the presence of the jury:

> "This witness has testified as to the fact that he observed this person's face that he then turned toward the bank manager, he saw him from the side and from the front." [App. 10]

The prosecutor's statement was untrue. In fact, Van Gemeren never testified that he had seen the man "from the front" or that he had observed his "face."

During the cross-examination of Hoffman, defense counsel attempted to establish that Hoffman did not see a front view of the man underneath the surveillance camera. Hoffman testified, "He would have been generally facing toward the teller area, and then occasionally shifting to his right . . ." [App. 18] The next question was interrupted by the prosecutor who stated in the presence of the jury,

> "He said he faced both ways, toward the witness and toward the tellers' area." [App. 19]

In fact, Hoffman never testified that the man faced towards him. Nor did Hoffman's testimony imply that

the man faced toward him.[55] *See Berger v. United States,* 295 U.S. 78, 87.

2. The Lineup And Photospread Occurred More Than Seven Weeks After The Robbery And Not Within 16 Days Of The Robbery.

In closing argument, the prosecutor stated that,

> "The interesting thing about Mr. Hoffman's testimony is . . . at the lineup which he attended, which was on February 23rd, that is 16 days after the robbery, . . . Now, prior to that lineup Mr. Hoffman had picked out the photograph of the defendant Robert Nobles.
>
> At this lineup he picked out the defendant Robert Nobles. . . ." [App. 38]

In fact, the lineup occurred more than seven weeks after the robbery, on March 30th, and the photospread was shown to Mr. Hoffman on March 28th [App. 18, 19]. This misstatement struck at the essence of the defense theory that a substantial length of time between the robbery and the lineup and identification made the identification suspect. [E.g. Tr. 710-11]

---

[55] If the man underneath the surveillance camera were facing the teller cages he would have had to "shift" more than 90° to his right to be facing Hoffman, since the surveillance camera was located several feet into the lobby from the business counter against which Hoffman was leaning. (See n.4, supra)

3. Witness Hoffman Did Not Testify That A Struggle Involving Defendant Nobles Made Him Particularly Aware Of Nobles

In argument, the prosecutor maintained that witness Hoffman,

> "... said that the one thing that really drew his attention to the defendant Robert Nobles was that the woman came in the bank, and he grabbed this woman. Then she subsequently ran out of the bank. This is an event which really stuck in his mind, as it would in any one of your minds." [Tr. 676]

In fact, Mr. Hoffman did not testify that the incident involving the woman drew his attention to the defendant. Nor did he testify in any other respect that this event "really stuck in his mind." [See Tr. 328] The argument that the face of an individual becomes imprinted on a witness' mind because of a memorable event is appealing. The prosecutor's misstatement offered an understandable reason why Hoffman, whose opportunity to see the robber under the camera was limited, was able to identify Nobles. (See pp. 5-7, supra)

> "[We] have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Berger v. United States*, 295 U.S. at 89.

III.

THE COURT'S REFUSAL TO PERMIT TESTIMONY OF RESPONDENT'S EYE-WITNESS IDENTIFICATION EXPERT WAS AN ABUSE OF DISCRETION AND CONSTITUTES A SEPARATE GROUND FOR AFFIRMING THE JUDGMENT OF THE COURT OF APPEALS[56]

The government's case against Nobles was based entirely on two eyewitness identifications of Robert Lee Nobles. Respondent therefore offered Dr. Robert Buckhout as an expert witness to shed light on the problems of eyewitness identification in general, and on the particular problems of identification in this case. The court refused to permit the expert to testify, finding that the offer of proof was inadequate, that his testimony would constitute an invasion of the province

---

[56]Respondent raised the issues set forth in Sections II and III before the court of appeals. No cross-petition before this court was filed. However, petitioner stated these two arguments in his Brief in Opposition to the petition for writ of certiorari. The order of this Court granting the writ, on January 20, 1975 did not specifically limit the issues to be briefed. Finally, Respondent relies on the principle that a prevailing party may assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U. S. 471,475-6, n. 6; *United States v. American Ry. Express Co.*, 265 U.S. 425, 435; Stern, "When to Cross-Appeal or Cross-Petition–Certainty or Confusion," 87 Harv. L. Rev. 763 (1974).

of the jury,[57] that it would not be of assistance to the trier of fact, and that it would result in an "undue consumption of time." [App. 29][58] The court of appeals found no abuse of discretion. [Pet. App. 6a]

The Supreme Court has made it clear that expert testimony may only be excluded if in the absence of such testimony, all "the primary facts can be accurately and intelligently described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience or observation in respect of the subject under investigation. . . ." *United States Smelting Co. v. Parry*, 166 F. 407, 411, 415 (8th Cir.). While the trial judge has discretion in the matter of the admission or exclusion of expert evidence, his action must be reversed if there has been an abuse of discretion. *Spring Co. v. Edgar*, 99 U.S. 645, 658; *Salem v. United States Lines Co.*, 370 U.S. 31, 35, reh. denied 370 U.S. 965; *Cohen v. Western Hotels, Inc.*, 376 F.2d 26, 27 (9th Cir.).

---

[57]Commentators and courts alike have recognized that when a court excludes testimony on the grounds that, if the witness is allowed to express his opinion, he would be "usurping the function of the jury", the phrase is so misleading, so unsound, that it should be repudiated entirely. 7 Wigmore, Evidence 1920 (3d ed. 1940); See *Rhynard v. Filori*, 315 F.2d 176; 178; (8th Cir.) *Padgett v. Buxton-Smith Mercantile Co.* 262 F.2d 39, 41 (10th Cir.)

[58]The court raised no objection to the qualification of Dr. Buckhout and was apparently satisfied with the complete offer of proof made as to his qualifications. See Clerk's Transcript on Appeal at 72.

A. EYEWITNESS IDENTIFICATION IS AN APPROPRIATE SUBJECT MATTER FOR EXPERT TESTIMONY

Respondent Nobles' offers of proof[59] specifically show why eyewitness identification is a subject of specialized knowledge, and why it is appropriate for expert testimony.

---

[59]The phrase "Offer of Proof" refers to the defendant's submitted "Offer of Proof" found at 79 *et seq.* in the Clerk's Transcript of the Record on Appeal and the defendant's Supplemental Offer of Proof marked as defendant's exhibit G. The pertinent parts of exhibit G are included in the appendix at 42. The history of these two memoranda is as follows: On Thursday, April 12, 1972, the court instructed defense counsel to submit an offer of proof as to Dr. Buckhout's testimony on Tuesday morning, April 17, 1973. Defense counsel stated that this would be difficult to do since he would be seeing Dr. Buckhout for the first time on Monday evening, April 16, 1973, when Dr. Buckhout arrived in Los Angeles. [Tr. 411-12] The Offer of Proof was submitted to the court at 9:30 am on April 16, but typographical errors and the need for fuller and clearer expression resulted in the submission of the Supplemental Offer of Proof at 1:30 on the same day, as part of a renewed motion that Dr. Buckhout be permitted to testify. [Tr. 546-47] This second proffer was made before the presentation of Mr. Nobles' case was complete. The Court refused to consider it, but later accepted it for marking as defense exhibit G. [Tr. 664] The specific opinion testimony regarding witnesses Hoffman and Van Gemeren is basically similar, although the Supplemental Offer is clearer and slightly more extensive. The supplemental offer of proof does expand on the theory of recognition and identification; at the time of the submission of the first offer, defense counsel had begun to expand on that subject and to describe the sixteen factors, but was stopped when the court stated that further explanation was not necessary. [Tr. 477]

Dr. Buckhout was prepared to testify concerning recognized theories of recognition and identification in the field of experimental and social psychology. [App. 42] Based on scientifically conducted experiments the hypotheses concludes that approximately sixteen factors affect the reliability of in-court identifications. [App. 42] Dr. Buckhout was prepared to describe these experiments, many of which he had conducted, in order to illustrate how the factors influence eyewitness identification. [App. 42]

B. THE EXPERT'S TESTIMONY WAS ADMISSIBLE UNDER THE OPINION RULE SINCE IT WOULD HAVE BEEN OF APPRECIABLE HELP TO THE JURY AND WAS NOT SUPERFLUOUS.

Since the subject of eyewitness identification is an appropriate area for expert testimony, the court should have admitted the evidence, as long as its admission would not have violated the Opinion Rule. See 7 Wigmore, *Evidence* § 557, (3d Ed. 1940). Dean Wigmore has stated that "[the Opinion Rule] . . . does not exclude . . . all testimony on a specific subject. It simply endeavors to save time and avoid confusing testimony by telling the witness:

" '[T]he tribunal is on this subject in possession of the same materials of information as yourself; thus, as you can add nothing to our materials for judgment, your further testimony is unnecessary' . . . In some instances, one witness may be able to give real help to the tribunal, while another may not . . . We are dealing

merely with a broad principle, that, whenever the point is reached at which the tribunal is being told that which it is itself entirely equipped to determine without the witness' aid on this point, his testimony is superfluous and is to be dispensed with." Wigmore, *supra* § 1918 at 11. A similar test is contained in Rule 702 of the Federal Rules of Evidence.[60]

The Advisory Committee's Note to Rule 702 contains this instructive comment:

> "Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. 'There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.' Ladd, "Expert Testimony", 5 Vand. L. Rev. 414, 418 (1952)."[61]

Van Gemeren's and Hoffman's in-court identifications were affected by five of the same factors:

---

[60]The rule provides that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

[61]*See generally, United States v. Cairns*, 434, F.2d 643,644 (9th Cir.); *United States v. Dellinger*, 472 F.2d 340, 383 (7th Cir.); See 2 Grand, Spencer, *Jones on Evidence* §14.9 at 607 (6th ed. 1972); McCormick, *Law of Evidence* §11 (1954).

(1) shortness of the period of observation

(2) feelings of stress

(3) prior conditioning and experience

(4) suggestion inherent in the photographic display

(5) suggestion inherent in the confrontation between eyewitness and Nobles during trial. [App. 42]

A sixth factor, personal bias, affected Hoffman's identification; the length of time between the robbery and subsequent identification was an additional factor affecting Van Gemeren.

Dr. Buckhout would have described how each of the factors which are subtle and often unrecognized affect eyewitness identification and such testimony would have been of particular assistance to the jury. For example, Mr. Hoffman was oblivious of the factor of prior conditioning when he chose defendant Nobles from a photospread and a lineup and consequently became progressively more confident about his choice. [Tr. 401, 404, 428] Dr. Buckhout was prepared to explain that the lineup identification was unreliable because the witness had in effect been coached on the correct answer, by having previously picked out a photograph of Nobles [App. 46]

The eyewitnesses were also unconscious of the suggestibility inherent in the courtroom. Dr. Buckhout would have explained that the in-court identification was unfair because Mr. Nobles was clearly recognizable as a defendant. [App. 46] He was prepared to discuss deficiencies in the use of the photospread, in which the average observer eliminates four or five of the photographs from consideration, and is therefore choosing between two, rather than among six photos.

This Court has expressed its concern with regard to the danger of pretrial identification, stating that,

> "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that '[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.'" Wall, *Eyewitness Identification in Criminal Cases* 26. Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.
>
> Moreover, "[i]t is a matter of common experience that, once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevent evidence) for all practical purposes be determined there and then, before the trial." (footnotes omitted)

See Gilligan, "Eyewitness Identification" 58 Military L. Rev. 183 (1972); Gorphe, "Showing Prisoners to Witnesses for Identification", 1 Am. J. Police Sci. 79, 82 (1930).

Dr. Buckhout would also have been of assistance to the jury in understanding the effect of conscious influences. The court focused on one of those factors,

stress, in denying the defense motion [App. 28]. Stress does appear to be one of the 16 factors which is least susceptible to expert testimony, yet its effect on identification is widely misunderstood. One common misconception is that an initial observation made under stress results in a more reliable subsequent identification. Dr. Buckhout was prepared to discuss data which illustrate the fallacy of this notion, and demonstrate that identification made under stress is apt to be less reliable.

Defense counsel cannot talk convincingly to a jury about these factors since his role is that of an advocate not an expert witness. The task becomes doubly difficult when the prosecutor plays upon the oftentimes simplistic notions of jurors, as in this case, when the prosecutor argued that a stressful moment during the robbery caused the robber identified as Nobles to "stick in the mind" of Hoffman [Tr. 676; pp. 66-7 *supra*]; in addition, the prosecutor claimed that the issue was simply one of whether or not the eyewitnesses were telling the truth (p. 62 *supra*).

Psychologists, writers, and reviewers often testify as to "contemporary community standards" in obscenity cases, where a jury is as equipped to decide without expert help as it is to deal with the problem of eyewitness testimony. Yet, Chief Justice Burger indicated that it would be error for a court to refuse expert testimony, stating that, "The defense should be free to introduce appropriate expert testimony . . . [in an obscenity trial]" *Kaplan v. California*, 413 U.S. 115, 121.

In support of this view, the Chief Justice cited the concurring opinion in *Smith v. California*, 361 U.S.

147, 160, in which Justice Frankfurter maintained that it is a violation of due process to forbid a defendant in an obscenity prosecution to introduce expert testimony on the prevailing literary and moral community standards.

> ". . . [T]o exclude such testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process. . . . "Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene . . ." Id. at 165, See *United States v. Palladino*, 475 F.2d 65, 74 (1st Cir.)[62]

Dr. Buckhout's testimony went to the very "essence" of the defense case and would have been illuminating to the jury.

Several courts of appeals have properly established a "presumption that informed opinion will be admitted." *United States v. Dellinger*, 472 F.2d 340, 383 (7th Cir.); *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 339, n.21 (7th Cir.), *Jenkins v. United States*, 307 F.2d 637, 644 (C.A.D.C.).

> "The resulting presumption that informed opinion will be admitted seems particularly appropriate in our increasingly complex society where specialization and segmentation of know-

---

[62]See Ross, "*Expert Testimony in Obscenity Cases*" 18 Hast. L. J. 161,178 (1966); McGaffey, "*A Realistic Look at Expert Witnesses in Obscenity Cases*", Nw. 69 U.L. Rev. 218, 225 (1974); Lockhart and McClure "Censorship of Obscentity, The Developing Constitutional Standards", 45 Minn. L. Rev. 5, 99 (1960).

> ledge are common, in everyday living as well as at highly technical levels, . . . At the same time it seems that people (including jurors), unexposed to increasing proportions of relevant knowledge and experience, are becoming more capable, because of greater education, of evaluating the expression of expert opinion." 472 F.2d at 383.[63]

Here, no countervailing consideration was present; the court's concern with the undue consumption of time was not well founded. In a criminal case for which petitioner was ultimately sentenced to twenty-five years

---

[63]The defendants in *Dellinger* were accused of inciting a riot. They sought to have several witnesses testify as experts about the "subject of crowd or riot control." 472 F.2d at 384. This evidence would tend to show that "police measures caused the crowd to riot," and therefore to "exonerate defendant's speeches from such responsibility." *Id.* The evidence would have included opinions by witnesses that the police broke "existing rules, and regulations, and methods of handling crowds." "Opinions were also to be expressed on crowd reaction to proper as compared to improper police crowd control techniques." The Seventh Circuit held that the exclusion of such testimony constituted an abuse of discretion on the part of the trial court. Crowd reaction, the court stated, "is not a subject equally within the realm of experience of jury members and the 'experts', "*Id.*

Respondent submits there is more reason to admit the testimony of an eyewitness expert such as Dr. Buckhout in the present case, than to admit testimony of experts on crowd or riot control in *Dellinger*. It could be argued that in *Dellinger*, lay witnesses from public agencies could have testified as to existing rules and methods of crowd control and to the behavior of police at the time in question. The jurors on the basis of these primary facts could reach conclusions. However, the court recognized that expert testimony would aid the jury, and consequently rejected this kind of analysis. Respondent urges that this Court similarly reject the trial court's position in this case.

in custody, Dr. Buckhout was the only expert witness whom the defense sought to present. If the spector of numerous expert witnesses, not present in this case, were to arise, a court might properly limit the number of such witnesses. Total exclusion, however, was improper.[64]

Dr. Buckhout possessed information based on scientific experiment and unfamiliar to the average person, about the factors affecting the reliability of eyewitness identification. This information would have been of assistance to the jury in reaching its determination as to the weight to be accorded the eyewitness testimony. The trial court's refusal to permit such testimony was an abuse of discretion and warrants affirmance of the judgment of the court of appeals.

---

[64]It should be noted that testimony of several government experts was admitted at trial. One of these experts was permitted to compare objects pictured in bank surveillance photographs with similar objects pictured in photographs taken after the arrests. This clearly violated the opinion rule and subsequently the court of appeals held that admission of much of the testimony constituted error. Although not admitted directly against Nobles, the testimony was damaging. The testimony was damaging and had a "spill-over" effect on respondent. (*See* Pet. App. 2a-5a).

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOHN K. VAN DE KAMP
Federal Public Defender
NICHOLAS R. ALLIS
Deputy Federal Public Defender
Room 707, U.S. Courthouse
312 North Spring Street
Los Angeles, CA 90012
Telephone: (213) 688-4796

Counsel for Respondent

Supreme Court, U. S.
FILED
APR 19 1975
MICHAEL RODAK, JR., CLERK

No. 74-634

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
JOHN C. KEENEY,
Acting Assistant Attorney General,
PAUL L. FRIEDMAN,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:	Page
Brennan v. *Arnheim & Neely, Inc.*, 410 U.S. 512	2
Brooks v. *Tennessee*, 406 U.S. 605	12
Caldwell v. *United States*, 205 F.2d 879	4
Coplon v. *United States*, 191 F.2d 749	4
Grand Jury Proceedings, Duffy, In re, 473 F.2d 840	10
Hickman v. *Taylor*, 329 U.S. 495	7, 8
Hoffa v. *United States*, 385 U.S. 293	5
Lawn v. *United States*, 355 U.S. 339	3
McGautha v. *California*, 402 U.S. 183	7
Maness v. *Meyers*, No. 73–689, decided January 15, 1975	14
National Labor Relations Board v. *International Van Lines*, 409 U.S. 48	2
Simmons v. *United States*, 390 U.S. 377	7
Strunk v. *United States*, 412 U.S. 434	2
Terkeltoub, In re, 256 F. Supp. 683	5
United States v. *Amaral*, 488 F. 2d 1148	3
United States v. *Kahan*, 415 U.S. 239	7
Wardius v. *Oregon*, 412 U.S. 470	13
Washington v. *Texas*, 388 U.S. 14	11, 12
William v. *Florida*, 399 U.S. 78	13

Constitution, statutes and rules:

	Page
United States Constitution:	
Sixth Amendment	2, 4, 5, 7, 10
18 U.S.C. 3006A(e)	4
18 U.S.C. 3500 (Jencks Act)	1
18 U.S.C. 3500(b)	9
18 U.S.C. 3500(e)(1)	9
28 U.S.C. App., pp. 7778–7779	8
Federal Rules of Civil Procedure, Rule 26 (b)(3)	8
Federal Rules of Criminal Procedure:	
Proposed Rule 12.1	12
Rule 16	1
Rule 16(g)	12, 13
Federal Rules of Evidence, Rule 612	12, 13
Miscellaneous:	
Advisory Committee Note to Proposed Rule 12.1, Fed. R. Crim. P., 62 F.R.D. 294	10
Advisory Committee Note to Rule 612, Fed. R. Evid., 56 F.R.D. 278	13
Annot., *Development Since Hickman v. Taylor of Attorney's "Work Product" Doctrine*, 35 A.L.R. 3d 412 (1971)	9
Comment, *The Work Product Doctrine in the State Courts*, 62 Mich. L. Rev. 1199 (1964)	8
Freund, *Work Product*, 45 F.R.D. 493 (1968)	9
McCormick, *Evidence* (2d ed. 1972)	8, 9
Note, *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940 (1961)	9
Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763 (1974)	2, 3
8 Wright and Miller, *Federal Practice and Procedure* (1970)	8

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-634

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In our main brief we have discussed most of the arguments put forth by respondent in his brief. We have demonstrated the inapplicability of the Jencks Act (18 U.S.C. 3500) and of Rule 16, Fed. R. Crim. P., to the situation presented by this case; the support for our position found in common law principles and in the new Federal Rules of Evidence; and the fact that the privilege against compulsory self-incrimination does not protect the defense investigator's report from production here—because it was not personal to respondent or testimonial in character, because its production was not compelled, and because respondent would have waived whatever privilege he

may have had when he offered the investigator as a witness at trial.

We will not burden the Court by reiterating arguments already presented or by responding to contentions made by respondent in these contexts. However, we do think it appropriate to address respondent's Sixth Amendment claim based on the "shield of confidentiality" that is said to be part of the right to counsel, the work product contention, and the preclusion sanction as it relates to the Sixth Amendment rights of confrontation and compulsory process.[1]

[1] Respondent also argues, as separate grounds for affirmance, the asserted abuse of discretion by the trial judge in refusing to permit testimony from a purported expert on the problems of eyewitness identification, and the alleged misconduct of the prosecutor. These issues, we submit, are not properly presented to this Court. If resolved in respondent's favor, they would entitle him to relief different from that which he was afforded by the court of appeals, since the retrial would thereby be governed by different rules. Since petitioner filed no cross-petition for a writ of certiorari, he may not now seek an affirmance of the judgment under review on these separate grounds. See *Strunk* v. *United States*, 412 U.S. 434, 437; *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4; Stern, *When to Cross-Appeal or Cross Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763 (1974).

Moreover, the trial court properly rejected the proffer of the testimony of a purported expert on the problems of eyewitness identification, concluding that such testimony would invade the province of the jury and that the offer of proof in this case was inadequate; the court of appeals found no error in this ruling (Pet. App. 6a). To the extent that the trial court's conclusion was based on the offer of proof in this particular case, it does not warrant this Court's attention. To the extent that it reflects a legal conclusion that eyewitness identification is not a proper subject for expert testimony, it is a matter that, so far as our research discloses, has been considered by only one federal court

Court's order

1. Respondent argues that the trial improperly pierced the 'shield of confidentiality" that is said to be a 'part of the Sixth Amendment right to counsel," thereby jeopardizing the ability of defense counsel to represent respondent. While we do not doubt that a criminal defendant is entitled to the effective assistance of counsel, the aid of investigators in his preparation for trial when necessary (see 18 U.S.C.

of appeals, the Ninth Circuit, in the instant case and in *United States* v. *Amaral*, 488 F. 2d 1148 (C.A. 9). It would be appropriate, we suggest, to allow other district courts and courts of appeals to consider the issue before this Court decides whether it should undertake to resolve it.

As for the issue of alleged prosecutorial misconduct, we submit that it too does not merit the attention of this Court in this case, particularly because it is a factual issue requiring detailed analysis of the record (see Stern, *supra*, 87 Harv. L. Rev. at 778–779)—an analysis, incidentally, in which the court of appeals already has engaged, leading it to conclude "that the trial judge conducted the case most properly, and the defendants received a fair trial" (Pet. App. 18a). It would be appropriate in these circumstances for this Court to exercise its discretion to decline respondent's invitation to consider this matter. The only question regarding purported prosecutorial misconduct that might arguably be relevant to the issue before the Court is the reference in the prosecutor's closing argument to the fact that the defense investigator never testified about what the witness Hoffman had said to him (App. 41). However, respondent's counsel never objected to this particular argument, nor did he request any corrective instruction in regard to it, despite abundant opportunity to do so (see Tr. 657–659, 750–754). Moreover, the court instructed the jury in its general charge that statements of counsel are not to be considered as evidence in the case (Tr. 757). In these circumstances—where a determination of plain error must be made on the entire record—we submit the alleged error is not appropriate for consideration by this Court. See *Lawn* v. *United States*, 355 U.S. 339, 359–360, n. 15.

3006A(e)), and the right to prepare his case without the intrusion of the government, these principles hardly support the proposition that the Sixth Amendment encompasses a "shield of confidentiality" that protects a defense investigator's report from disclosure to the government *after* the defendant offers the investigator as a witness at trial. The cases cited by respondent deal with evils far different from that which respondent says is involved in this case and are thus wholly inapposite.

In *Coplon* v. *United States,* 191 F.2d 749 (C.A.D.C.), the defendant alleged that government agents deliberately intercepted telephone conversations between the defendant and her lawyer, thereby interfering with her right to consult privately with counsel. In *Caldwell* v. *United States,* 205 F.2d 879 (C.A.D.C.), the government hired an informant to find out who was behind the defendant's alleged offenses; the informant became acquainted with defendant and his counsel and soon was asked to work on a number of matters arising in the preparation of the case. "In his dual capacity as defense assistant and Government agent * * * [he] gained free access to the planning of the defense" (205 F.2d at 880), and he reported to the government information regarding matters connected with the impending trial. Quoting from *Coplon,* the court held that "[t]he prosecution is not entitled to have a representative present to hear the conversations of accused and counsel" (*id.* at 881).

This Court termed the conduct in both *Coplon* and *Caldwell* "government intrusion of the grossest kind upon the confidential relationship between the defend-

ant and his counsel." *Hoffa* v. *United States,* 385 U.S. 293, 306. Nevertheless, it declined in *Hoffa* to apply the principles of those cases to reverse convictions for endeavoring to bribe members of a jury at a previous trial, despite the fact that during the previous trial a government informer had been present in and around the hotel suite where petitioner Hoffa had conferred with his lawyers. The testimony of the informant at the second trial could not be viewed, said this Court, as a "fruit" of the Sixth Amendment violation at the first trial, if any.

In this case, we submit, there is neither "fruit" nor "tree." An order of a court to disclose carefully limited portions of an investigator's report after the defense has chosen to call the investigator as a witness at trial is a far cry from the kind of surreptitious intrusion by the prosecution or police into the confidential relationship between a defendant and his lawyer that was found to be a Sixth Amendment violation in *Coplon* and *Caldwell* and assumed to be one in *Hoffa.*[2]

---

[2] Nor is *In re Terkeltoub*, 256 F. Supp. 683 (S.D. N.Y.), relevant. That case turned largely on its own facts. It involved the compelled testimony of an attorney before a grand jury, during the defense preparation for a perjury trial, when the very subject of the grand jury inquiry was to be the attorney's investigation and preparation for trial. In those circumstances, the court found "no showing of the kind of vital, urgent, and immediate need for unique knowledge that might warrant the extraordinary compulsion the Government seeks" (256 F. Supp. at 686). Here, on the other hand, there was no compulsion, and the need for the knowledge was "vital, urgent, and immediate," for the investigator had been voluntarily offered by the defense as a witness at trial, and his report was to be produced only after the completion of the government's case-in-chief and after the direct examination of the investigator.

573-589—75——2

Respondent further argues that orders such as that entered by the trial court in this case will jeopardize the ability of defense counsel to represent their clients effectively. It is suggested that such orders will impair the relationship of trust between defendants and their lawyers, inhibit investigators from gathering all the facts (both favorable and unfavorable), and encourage investigators to stop writing reports or to censor or tailor them. Of course, these dire consequences envisioned by respondent could arise only to the extent that the defense plans to offer testimony on a particular subject that is being investigated by its witness, and only to the extent that the witness's contemporaneous report of the investigation varies materially from the testimony the defense expects him to give at trial.

By ignoring the limited scope of the disclosure order in this case and the ability of the defense to withhold the report by not proffering testimony on the subject, respondent distorts the issue here. Nothing in the result we seek in the instant case would impinge upon the right of a defendant to withhold damaging information or create any obligation on him similar to that imposed on the government by *Brady;* only his power to *present* information in a false, misleading, or incomplete manner is involved.

We fail to see how the carefully circumscribed ruling of the district court in this case could have any effect on defense strategy beyond inhibiting the presentation of testimony that the defense knows or should know is either untruthful or of impaired reliability. Respondent's suggestion that the effect of the

ruling would be to generate deliberately falsified or incomplete reports in order to enable more freewheeling testimony at trial better suited to the convenience of defense strategy merely highlights and reinforces, in our view, the urgency of the need to permit disclosure of these reports in order to make possible meaningful and effective cross-examination and to aid the jury in its fact-finding mission.[3]

In sum, what is at stake here is the "right" of the defense to present distorted or incomplete evidence and to insulate its witnesses from effective cross-examination. We doubt that this properly can be considered a core value of the Sixth Amendment's right to counsel.[4]

2. Respondent next contends that the defense investigator's report constituted attorney's work product and was therefore privileged. We submit, on the contrary, that the work product rule has no application to the present situation.

The work product rule was recognized by this Court in the landmark case of *Hickman* v. *Taylor,* 329 U.S.

---

[3] Moreover, the fact that defendants and their attorneys have maintained frank, trusting and often successful relationships despite such innovations as the reciprocal discovery provisions of Rule 16 and the alibi notice and insanity notice rules substantially undermines respondent's argument.

[4] To the extent that respondent's Sixth Amendment argument is premised on the statement in *Simmons* v. *United States*, 390 U.S. 377, 394, that it is "intolerable that one constitutional right should have to be surrendered in order to assert another" the validity of that notion in the context of the Sixth Amendment is not at all clear. See *United States* v. *Kahan*, 415 U.S. 239, 243; cf. *McGautha* v. *California*, 402 U.S. 183, 210–213. Nor, as we have indicated, is there anything in this case remotely like the kind of tension between constitutional rights that there was in *Simmons*.

495, and it is now codified for civil cases in Rule 26(b)(3) of the Federal Rules of Civil Procedure. One of its basic purposes is to prevent the unseemly practice of an attorney being forced to become a witness at trial to testify about matters in his files that previously have been disclosed to his adversary. Thus, the work product rule provides a qualified and limited protection before trial for trial preparation materials in the attorney's file that reflect his mental impressions, personal beliefs, trial strategy, legal opinions and conclusions, and the like. It thereby protects the privacy of the attorney during his preparation for litigation and prevents lawyers from obtaining the benefit of their opponents' diligence to aid their own preparation. See *Hickman* v. *Taylor, supra,* 329 U.S. at 508–514; *id.* at 514–519 (Jackson, J., concurring); McCormick, *Evidence* § 96, p. 207 (2d ed. 1972); 8 Wright and Miller, *Federal Practice and Procedure* § 2025, p. 212 (1970); Comment, *The Work Product Doctrine in the State Courts,* 62 Mich. L. Rev. 1199, 1200–1202 (1964).

One might question whether these principles apply at all when the potential witness is a defense investigator rather than an attorney.[5] Regardless of how one would resolve that issue, however, there can be no doubt that the protection arguably provided by the work product rule is terminated when, as here, a party

[5] The 1970 Amendments to Rule 26(b)(3), Fed. R. Civ. P., extended the protection of the work product doctrine to a "party's representative," but the Advisory Committee's Notes point out that the courts previously had been split on whether the *Hickman* work product doctrine applied only to attorneys. See 28 U.S.C. App., pp. 7778–7779.

offers a witness at trial and examines him about matters that the work product rule may theretofore have protected from disclosure. See Annot., *Development, Since Hickman* v. *Taylor, of Attorney's "Work Product" Doctrine,* 35 A.L.R. 3d 412, 484 (1971). Once trial has begun and the party claiming the protection of the rule calls such a witness to the stand, the principles of *Hickman* can no longer be invoked.

In the case at bar, the investigator already had memorialized his interviews in writing and turned his written report over to respondent's counsel. Respondent already had produced the investigator to testify about his recollection regarding the witnesses' remarks. At that point, the written report regarding the investigator's interviews—which itself constituted a written statement of the investigator—would have been most useful to attempt to impeach the investigator, who himself was called for the purpose of impeaching government witnesses. See Note, *Developments in the Law—Discovery,* 74 Harv. L. Rev. 940, 1037 (1961); Freund, *Work Product,* 26 F.R.D. 493, 496–497 (1968).[6] Having called the investigator as a witness, the defense signified an intention to reveal a portion of its "work product" relating to the investigator's interviews with government witnesses. It is

[6] Indeed, were the tables turned, the trial court undoubtedly would have considered the report of the investigator as "a written statement made by said witness [the investigator]" (18 U.S.C. 3500(e)(1)) and would have ordered the relevant portions of the "statement" produced under the Jencks Act. See 18 U.S.C. 3500(b).

axiomatic that it is not free to withhold the relevant remainder. See McCormick, *Evidence, supra,* at § 93.[7]

3. Respondent argues that the trial court deprived him of his Sixth Amendment rights to compulsory process and cross-examination of witnesses by precluding him from presenting the testimony of the defense investigator because he refused to produce relevant portions of the investigator's report. He suggests that the court should have applied alternative, less severe sanctions in lieu of preclusion and that preclusion is never an appropriate sanction against one who acts in good faith.

One reason this Court should reject this contention is that respondent failed to raise it in the trial court in any meaningful way by suggesting a viable alternative to preclusion. While he did suggest that the trial judge should permit the witness to testify and then strike the testimony, the judge properly concluded that there is no real distinction between not allowing the witness to testify at all and later striking the testimony; indeed, he noted: "[I]t would appear to me to be much more prejudicial to your client to have to strike this testimony than to have it not introduced"

[7] Respondent relies upon the Eighth Circuit's opinion in *In re Grand Jury Proceedings, Duffy*, 473 F. 2d 840. Regardless whether the *Duffy* case was rightly decided, it is not applicable here. For *Duffy* held only that, prior to trial in a case, an attorney could not be compelled to testify before a grand jury with respect to his personal recollections or the contents of summaries he made and conclusions he drew with respect to interviews he had conducted in the course of preparation for anticipated litigation. Here, respondent voluntary offered the investigator as a witness to testify about those very matters.

(App. 35). The prejudice that would flow from the alternatives proposed by respondent for the first time in this Court—permitting the investigator to testify with an instruction from the court that he had refused to disclose the relevant portions of his report and that this refusal could be considered in assessing credibility, or allowing a comment by the prosecutor on the defense refusal to obey a court order—are, we suggest, even more prejudicial. One can readily surmise that defense counsel perceived that when he failed to suggest them to the trial court. In any event, the failure to suggest alternatives to the court that had the opportunity immediately to implement them should bar respondent from now attacking the decision of that court to fashion its own remedy—preclusion—for a deliberate decision not to comply with a court order.

On the merits of respondent's argument, we submit that this Court's decision in *Washington* v. *Texas,* 388 U.S. 14, upon which respondent relies, does not support his contention that the preclusion sanction employed here violated his Sixth Amendment right to compulsory process. That case involved a state statute that made the testimony of an accomplice "inadmissible whether he was present in the courtroom or not" (388 U.S. at 19). The Court found that such an "arbitrary rule," preventing "whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief" violated the compulsory process clause (*Id.* at 22). The order of the trial court here is not of that variety; for it did not preclude the testimony of all defense investigators

but merely required respondent to comport with certain reasonable procedures as a prerequisite to the admission of the testimony of a particular investigator whom he chose to call as a witness. While *Washington* v. *Texas* obviously means that there is more to the compulsory process clause than the right to secure the attendance of witnesses in court, it does not mean that there can never be justification, in the particular circumstances of an individual case, for preventing a party from placing a particular witness on the stand or from conditioning his testimony on compliance with certain reasonable procedural requirements.[8]

It is significant that Rule 16(g) of the Federal Rules of Criminal Procedure, Rule 612 of the Federal Rules of Evidence, proposed Rule 12.1 of the Federal Rules of Criminal Procedure (the alibi notice rule), and the alibi notice rules of many States provide for the exclusion of testimony of witnesses for either side as a sanction that may be imposed in the discretion of the trial court. Indeed, as the Advisory Committee on the Federal Rules has noted in a similar context: "[I]t is generally assumed that the sanction is essential if the notice-of-alibi rule is to have practical significance." Advisory Committee Note to Proposed Rule 12.1, Fed. R. Crim. P., 62 F.R.D. 294. And while the Federal Rules of Evidence, in making clear that the sanc-

[8] Nor does *Brooks* v. *Tennessee*, 406 U.S. 605, support respondent's argument. The opinion in that case was not based upon the compulsory process clause, nor did it in any way limit impeachment and cross-examination of a witness (406 U.S. at 609) or curtail the ordinary power of the trial judge to conduct the trial (406 U.S. at 613).

tions of the Jencks Act continue to apply, are explicit in imposing against the government the sanction of striking of testimony for failure to disclose a writing producible under Rule 612, they do not preclude the use of such a sanction when the defense fails to comply with the Rule. Indeed, the Rule requires the court to "make any order justice requires" (Rule 612, Fed. R. Evid.), and the Advisory Committee refers to Rule 16(g), Fed. R. Crim. P.— which includes the preclusion sanction—as a source "for appropriate sanctions." Advisory Committee Note to Rule 612, Fed. R. Evid., 56 F.R.D. 278. We submit that the presence in the federal rules of such a sanction strongly suggests that the preclusion order entered by the trial judge in this case did not unconstitutionally impair respondent's Sixth Amendment right to compulsory process.[9]

As for respondent's argument that he was denied the right effectively to cross-examine the government witnesses because he could not complete the impeachment by placing the investigator on the stand, we can only suggest—as we have before [10]—that to accept this argument would be to permit the defense fully to exploit the devices of cross-examination and impeachment by prior inconsistent statements while at

[9] Respondent should find no comfort in the fact that this Court has not yet decided the validity of such a sanction in the context of the alibi notice rules. See *Wardius* v. *Oregon*, 412 U.S. 470, 472, n. 4; *Williams* v. *Florida*, 399 U.S. 78, 83, n. 14. If any inference can be drawn, it is that the Court would not at once sustain a rule requiring certain procedures while simultaneously deciding not to afford trial courts any meaningful sanctions for enforcing the rule.

[10] Brief for the United States, pp. 22–27.

the same time depriving the prosecution of the effective use of the same tool by denying it the opportunity to impeach defense witnesses. Adoption of such a position would defeat the ends of justice by allowing a partial presentation of the facts and thereby impeding the ascertainment of the truth.

Finally, there is no merit whatsoever to respondent's contention that preclusion was inappropriate because he declined to produce relevant portions of the investgator's report in "a good faith belief" that his refusal was legally sound. As this Court has so recently said, "[A]ll orders and judgments of courts must be complied with promptly," even if one believes the order to be incorrect. *Maness* v. *Meyers*, No. 73–689, decided January 15, 1975, slip op., pp. 9–10. While in some cases one can comply with the order but preserve his point for appeal, or seek a stay of the order for the purpose of pursuing an appeal, or refuse to comply with the order and face contempt (*id.* at 10–14), it is ludicrous to suggest that, because the non-compliance is in good faith, the trial judge is without power to impose a sanction and must proceed with the trial as if there had been no violation of his ruling.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
JOHN C. KEENEY,
Acting Assistant Attorney General.
PAUL L. FRIEDMAN,
Assistant to the Solicitor General.

APRIL 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975

Supreme Court, U. S.
FILED
APR 14 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-634

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT LEE NOBLES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* FEDERAL PUBLIC DEFENDER OF NEW JERSEY, IN SUPPORT OF RESPONDENT

ROGER A. LOWENSTEIN
Federal Public Defender
976 Broad Street
Newark, New Jersey 07102

Counsel to Amicus Federal Public Defender of New Jersey

With him on the brief:

DAVID A. RUHNKE
Seton Hall Law School
1095 Raymond Boulevard
Newark, New Jersey 07102

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

PAGE

STATEMENT OF INTEREST OF AMICUS 1

ARGUMENT OF LAW:

I—The decision below may be affirmed on settled principles of evidence 2

A. Under common law rules of evidence governing the trial in this case, the investigator would not have been required to turn over copies of his notes to the Government unless and until he used those notes to refresh his memory 3

B. Even had the investigator used his notes prior to testifying at trial, and even had the new rules of evidence been in effect, the Government would still not have been entitled to use the reports for the purpose of cross-examining the investigator 4

1. The investigator's notes are not a "statement" within the meaning of new rule 613(a) 5

2. New rule 612 also has no application to the facts of the present case 5

II—Among the complex of values inherent in the Fifth Amendment is the concept that the defendant in a criminal case is under no compulsion to provide the prosecution with information that the defendant has no desire to use at trial 7

PAGE

A. The defense investigator's notes could not have been made the subject of a pretrial discovery order 7

B. The Jencks Act is not a two-way street 8

C. Recent decisions of this Court do not justify the routine discovery by the government of statements of defense witnesses 10

III—An investigator for the defense is not just any witness 12

CONCLUSION 15

Cases Cited

Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 346-48 (1936) 2

Brady v. Maryland, 373 U. S. 83 (1963) 9

Brooks v. Tennessee, 406 U. S. 605 (1972) 10

Jencks v. United States, 353 U. S. 657 (1957) 6

Kane v. United States, 431 F. 2d 172, 174 (8th Cir. 1970) 5

McQueen v. Swenson, 498 F. 2d 207, 216 (8th Cir. 1974) 13

Palermo v. United States, 360 U. S. 343 (1959) 5

People v. Chavez, 33 Cal. App. 3d 454, 109 Cal. Rptr. 157 (1973) 14

Schmerber v. California, 384 U. S. 757, 762 (1966) 11

Shepherd v. Hunter, 163 F. 2d 872 (10th Cir. 1957) 13

United States v. Brown, 501 F. 2d 146, 159 (9th Cir. 1974) 3, 8

PAGE

United States v. Burr, 25 F. Cas. 30, 32 (No. 14, 692d) (Cir. Ct. of Va. 1807) 12

United States v. Krilich, 470 F. 2d 341 (7th Cir.) cert. denied 411 U. S. 938 (1972) 5

United States v. Socony Vacuum Oil Co., 310 U. S. 150, 233 (1940) 3

United States v. Swindler, 476 F. 2d 167, 169 (10th Cir. 1973) 5

United States v. Wright, 489 F. 2d 1181, 1188 (D. C. Cir. 1973) 2, 3, 8, 9, 13, 14

Wardius v. Oregon, 412 U. S. 470 (1973) 11

Williams v. Florida, 399 U. S. 78 (1970) 10, 11

United States Constitution Cited

Fifth Amendment 7, 8, 10-14

Sixth Amendment 13, 14

Fourteenth Amendment 10

Statutes Cited

Criminal Justice Act 1

Jencks Act, 18 U.S.C. Sec. 3500 (1970) 6, 8-10

(P.L. 93-595, 88. Stat. 1929) 4

Rules Cited

Federal Rule of Criminal Procedure:

16(c) 7, 8

Federal Rules of Evidence:

612 ..... 5, 6

613(a) 5

PAGE

Other Authorities Cited

A.B.A. Project on Standards for Criminal Justice, Standards Relating to Providing Defense Services:

(Approved draft, 1968)—
Sec. 1.5 13

(Approved draft, 1971)—
Sec. 4.1 13

Goldstein, The State and the Accused: Balance of Advantages in Criminal Procedure, 69 Yale L. J. 1149, 1185-92 (1960) 12

The Indigent's Right to an Adequate Defense: Expert and Investigational Resources in Criminal Proceedings, 55 Corn. L. Rev. 632 (1970) 13

McCormick on Evidence, Sec. 9, p. 17 (2d ed. 1972) 3

Nakell, Criminal Discovery for the Defense and Prosecution—The Developing Constitutional Considerations, 50 N. Car. L. Rev. 437, 443-44 (1972) 10-12

Wigmore, Evidence, Sec. 762 (Chadbourn Rev. 1970) 3

1 Wright, Federal Practice and Procedure, Sec. 255 at 520 (1969) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-634

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT LEE NOBLES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* FEDERAL PUBLIC DEFENDER OF NEW JERSEY, IN SUPPORT OF RESPONDENT

Statement of Interest of *Amicus*

Amicus is the Office of the Federal Public Defender for the District of New Jersey. The Federal Public Defender's Offices have been organized pursuant to the Criminal Justice Act. The Federal Public Defender Office

in New Jersey represents indigent defendants in the New Jersey federal districts courts. The staff of the office consists of five attorneys, two investigators and two legal secretaries. Without the assistance of the two investigators, the office of the *Amicus* could not effectively maintain its large case load, nor could clients be effectively represented. The principal protagonist in the case presently before this Court, Mr. Bond, is the defense investigator in the Federal Public Defender's Office in Los Angeles. The discovery of Mr. Bond's notes and the legal principles asserted by the government in this case touch upon the very effectiveness of the Office of the Federal Public Defender in providing adequate representation to its clients, and for that reason, this brief is submitted as a friend of the Court.

I

The decision below may be affirmed on settled principles of evidence.

Ordering a defense investigator to make available to the Government a copy of interview notes raises legal questions that "are as unchartered as they are fundamental." *United States* v. *Wright,* 489 F. 2d 1181, 1188 (D. C. Cir. 1973). The decision below may be affirmed, however, on settled principles of evidence. See *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 346-48 (1936) (opinion of Brandeis, J., concurring).

A. Under common law rules of evidence governing the trial in this case, the investigator would not have been required to turn over copies of his notes to the Government unless and until he used those notes to refresh his memory.

It is a "hornbook rule of evidence" that a writing used by a witness to refresh a temporarily stale memory must be turned over to the opposing party for cross-examination purposes. See, e.g., *United States* v. *Wright,* 489 F. 2d 1181, 1188 (D. C. Cir. 1973); *McCormick on Evidence,* § 9, p. 17 (2d ed. 1972); 3 *Wigmore, Evidence,* § 762 (Chadbourn Rev. 1970); but cf. *United States* v. *Socony Vacuum Oil Co.,* 310 U. S. 150, 233 (1940) (opposing counsel not entitled to inspect transcript of prior testimony where judge read portions thereof to refresh a witness' memory).

In the case at hand, the trial judge's order may best be described as premature. The investigator never got the chance to testify.

In his dissent below, Judge Kilkenny assumed that the investigator, upon taking the stand, "would have said that he used the statement to refresh his memory." *United States* v. *Brown,* 501 F. 2d 146, 159 (9th Cir. 1974) (opinion of Kilkenny, J., dissenting). The Government, arguing alternatively, makes a similar assumption. (Gov't's Brief at 40.) Leaving aside the propriety of assuming critical facts in a criminal case, an opposite assumption to the one used by the dissenting judge and the Government is equally if not more likely.

A defense investigator is not just any witness. It is fair to assume that defense counsel and investigator conferred on the Nobles defense on numerous occasions. It was crucial to the defense that the two eyewitnesses be discredited, and certainly, the statements given by the witnesses to the investigator were of great value to the

defense in that effort. It is unlikely that Mr. Bond would have had to refer to his notes to recall the statements on the day of the trial. The much more likely assumption is that Mr. Bond would have testified from his own independent recollection of the statements. Therefore, on common law principles of evidence, the Government would not have been entitled to use the notes on cross-examination.

B. Even had the investigator used his notes prior to testifying at trial, and even had the new evidence rules been in effect, the government would still not have been entitled to use the reports for the purpose of cross-examining the investigator.

The new Federal Rules of Evidence (P.L. 93-595, 88 Stat. 1929 *et seq.*) were signed into law by President Ford on January 2, 1975. They take effect on July 1, 1975, and, of course, in no way governed the conduct of the trial here under scrutiny. Nevertheless, the Government argues that the new rules are persuasive authority for what common law rules should be. (Gov't's Brief at 35-44.) As discussed above, settled principles of common law evidence militate against the result urged on the Court by the Government. It is the position of *amicus* that the new rules of evidence are persuasive only on the question of what rules of evidence congress feels should govern the federal practice. However, even accepting *arguendo* the proposition that the new rules should control this case, the result is identical. First, unless and until there was a showing that the investigator had used the notes to refresh his memory prior to or during trial, the Government was not entitled to make any use of them. Second, by the same token, unless the investigator's notes rose to the status of a "statement", the Government was not entitled to inspect or use the notes.

1. The investigator's notes are not a "statement" within the meaning of new rule 613(a)

Under new rule 613(a), where counsel is examining a witness concerning the witness' prior statement, that statement must be made available for inspection at that time upon the request of opposing counsel. In the present case, the Government concedes that something was indeed made available to it concerning a "statement" of the eyewitness Van Gemeren. (Gov't's Brief at 36-37, n. 13.) The "statement" referred to is the disputed investigator's report. The eyewitness in no way endorsed this report. It is highly unlikely that notes of an interview made by the interviewing party without the review or endorsement of the person being interviewed can even rise to the status of a "statement." See, e.g., *Palermo* v. *United States,* 360 U. S. 343 (1959) (summary of interrogation not witness' statement); *United States* v. *Swindler,* 476 F. 2d 167, 169 (10th Cir. 1973) (informal descriptions of testimony of several other witnesses not their statements); *United States* v. *Krilich,* 470 F. 2d 341 (7th Cir.), *cert.* denied 411 U. S. 938 (1972) (witness' summary of investigation not statement); *Kane* v. *United States,* 431 F. 2d 172, 174 (8th Cir. 1970) (interviewer's notes not statement where witness did not adopt or approve contents of notes). Therefore, even were new rule 613(a) to apply retroactively to the facts of this case, the item in question cannot be said to be a "statement".

2. New rule 612 also has no application to the facts of the present case

Under new rule 612 of the Federal Rules of Evidence, a witness who uses a writing to refresh his or her memory while testifying or *prior* to testifying must make

the writing available to the adverse party. The government contends that the new rule will create a two-way Jencks Act. (Gov't's Brief at 39.) That contention is patently nonsensical.

In enacting the Jencks Act, 18 U.S.C. § 3500 (1970), Congress sought to limit the effect of this Court's decision in *Jencks* v. *United States,* 353 U. S. 657 (1957). Neither that decision nor the congressional enactment have anything to do with the subject matter of new Rule 612. The rule is concerned with the evidentiary question of refreshed memory. Absent a showing that the witness' memory had to be refreshed prior to or during the trial, the rule does not operate. Imprecise analogies in the Advisory Committee's Note to the contrary notwithstanding,[1] the rule is concerned solely with refreshed memory. The Government concedes this much:

> [New Rule 612] would have required production at trial, for purposes of cross-examination of Bond, of the relevant portions of Bond's notes, *assuming that Bond had used the notes to refresh his recollection.* (Gov't's Brief at 40, emphasis added)

The Government argues that 1) this Court should assume the retroactive application of the new rules, and, 2) this Court should also assume the existence of the rules' triggering event—use of a writing to refresh memory. Neither assumption is warranted by law or fact.

---

[1] In discussing the new rule, the Advisory Committee made extensive analogy to the Jencks Act, but only so far as the Committee saw the Jencks Act as promoting "the search of credibility and memory." 56 F.R.D. at 277. The Committee went on to note that the Jencks Act operates whether or not the government witness uses a statement to refresh his or her memory, a situation beyond the scope of the new rule.

II

Among the "complex of values" inherent in the Fifth Amendment is the concept that the defendant in a criminal case is under no compulsion to provide the Government with information that the defendant has no desire to use at trial.

A. The defense investigator's notes could not have been made the subject of a pre-trial discovery order.

Federal Rule of Criminal Procedure 16(c) permits the Government to obtain a court order conditioning a defendant's right to discover government information on his or her willingness to permit the government, in return, "to inspect, copy or photograph" material which "the defendant intends to produce at trial . . ." *F.R.Crim.P.* 16(c).

The defendant here did not seek to introduce the investigator's notes into evidence or in any other way "produce" the report at trial. Counsel had a copy of the report with him at counsel table. Certainly that fact alone would not entitle the Government to examine and use it. To the extent, then, that the reciprocal discovery provisions of the federal rules are a permitted derogation of the principle that the government must convict without assistance from the accused, the Government's argument reaches beyond the limits of permitted pretrial discovery.

The fact that the Government's right to discovery is limited to documents which the accused intends to produce at trial is central to insulating the rule from constitutional challenge. See 1 *Wright, Federal Practice and Procedure* § 255 at 520 (1969). F.R.Crim.P. 16(c) goes to the very edge of the Fifth Amendment's protections. *See* 39 F.R.D. 252, 272 and 277 (1966) (opinions of Justices Black and Douglas, respectively, dissenting from the proposed amendments to F.R.Crim.P. 16.) The position

urged by the Government goes beyond Rule 16's limits and intrudes into areas protected by the Fifth Amendment.

B. The Jencks Act is not a two-way street.

As noted earlier much of the Government's argument centers upon the idea that it is unfair that the Government must make available to the defense statements of Government witnesses at the close of their direct testimony without the defense having to assist the Government in return. (Gov't's brief at 22-28.) A mutual exchange of statements is not the issue here. In his dissent below, Judge Kilkenny, who assumed that the investigator would have had to have refreshed his recollection had he been permitted to testify, said the issue was simply

> a common law evidentiary question of whether a witness who was called for impeachment purposes must produce the notes he admittedly made on the subject of impeachment. *United States* v. *Brown,* 501 F.2d at 161 (9th Cir. 1974) (opinion of Kilkenny, J., dissenting).

The Government does not urge (as it could not) that the Jencks Act, by its terms, applied to the facts of this case.[2] The end-result is, however, the same. As in *United States* v. *Wright,* supra,

> the Government proposes that this court adopt a common law rule of evidence which requires the defense, after its witness has testified on direct examination, to turn over to the prosecution prior

[2] The Jencks Act requires the government to provide to the defense statements of government witnesses. 18 U.S.C. § 3500 (1970).

> statements of that witness so that those statements could be used by the Government to cross-examine the witness. In effect, this rule would make the Jencks Act applicable in principle if not in express terms to the defense as well as the prosecution. 489 F.2d at 1190 (D.C.Cir. 1973).

In *Wright,* supra, the District of Columbia Circuit considered the argument in detail, and concluded that

> The defense has no duty to help the prosecution convict the defendant. We therefore reject any rule which would require the defense to turn over to the prosecution prior statements of defense witnesses which could be used by the prosecution as evidence against the accused. *Id.* at 1195 (D.C. Cir. 1973).

Despite the clear treatment of this kind of discovery in rule and statute, the Government maintains that if the defense has access to statements of Government witnesses, then the Government ought to have access to statements of defense witnesses. Complete mutuality of discovery may be an appropriate guide where private parties dispute over private matters, but where the Government seeks to enforce criminal laws, mutuality is inappropriate. For example, the Government is under a duty to reveal information to the defense which may bear on the innocence of the accused, *Brady* v. *Maryland,* 373 U.S. 83 (1963). The defense could certainly never be required to respond in kind.

> Except in pursuit of abstract symmetry, the discovery that a defendant can get is not logically related to what the prosecution gets. To deny defense discovery because of limitations that the privilege against self-incrimination imposes on prosecution

> discovery is to transform a constitutional protection so important that conditions cannot be imposed on its exercise into an excuse for a diminution of the defedant's chance to clear himself. Nakell, *Criminal Discovery for the Defense and Prosecution—The Developing Constitutional Considerations,* 50 N.Car.L.Rev. 437, 443-44 (1972) (footnote omitted).

Ignoring the fact that discovery in a criminal case can never be a free-flowing, two-way street between the accuser and the accused the Government urges that this Court add a reciprocity feature to the Jencks Act. Neither the Act nor the new rules of evidence justify a result that so violates the protections of the Fifth Amendment.

C. Recent decisions of this Court do not justify the routine discovery by the government of statements of defense witnesses.

In recent years, this Court has had occasion to consider the reach of the government's right to discover elements or strategy of a defense to a criminal charge. Compare *Williams* v. *Florida,* 399 U.S. 78 (1970) (state alibi-notice requirement held constitutional) with *Brooks* v. *Tennessee,* 406 U.S. 605 (1972) (state requirement that defendant testify as first defense witness, or not at all, held violative of Fourteenth Amendment). In reaching its decisions, this Court has always emphasized that the results followed from the premise that the defense need only reveal to the Government that which would appear anyway. Hence, in *Williams* v. *Florida, supra,* pretrial disclosure of the names of alibi witnesses affected only the timing of disclosure. In effect, this Court held in *Williams* that an accused does not have a right of Fifth Amendment dimension to launch a last-ditch defense. 399 U.S. at 81.

In this case, the Government seeks this Court's approval of an attempt to obtain materials which the defendant never intended to use as evidence or present as part of the defense. The Government does not justify its discovery argument by claiming the need to avoid surprise, cf. *Wardius* v. *Oregon,* 412 U.S. 470 (1973), nor does the Government argue that it seeks only that which would be revealed at trial, cf.*Williams* v. *Florida, supra.* Instead, the Government seeks a rule which would require a defendant to assist the Government in its attempts to dismantle the defense. The Fifth Amendment bars that result.

Despite the Government's arguments to the contrary, (Gov't's Brief at 45-48), the Fifth Amendment is something more than a personal privilege of a person accused of a crime. Rather, it reflects and protects a "complex of values." *Schmerber* v. *California,* 384 U. S. 757, 762 (1966).

The Amendment is not "a friend of open inquiry." *Nakell, supra,* 50 N.C. L. Rev. at 481. Instead, it embodies and protects fundamental value judgments of a free society. One of the most fundamental of those judgments is that the Government must shoulder the burden of conviction without the aid of the accused. Because that judgment is fundamental to an accusatorial system of criminal justice, the Amendment cannot long withstand nice distinctions. As Prof. Nakell concludes,

> Vigilance [in enforcing the amendment's protections] must be broader than the actual threats of abuse and nearly as broad as their possible scope. Because circumstances in which the application of the privilege against self-incrimination seems extravagant are . . . easy to find, the privilege is a common focus of majoritarian frustration. For this

> reason, the important work of the privilege needs the sanctity of a fundamental charter and a strong tradition of liberal interpretation. Being too often unpopular, it cannot withstand niggardly enforcement or cautious interpretation based on academically narrow distinctions. *Nakell, supra,* 50 N.C. L. Rev. at 515-16.

In a criminal prosecution, the accused has few enough friends, few enough advantages. See generally, Goldstein, *The State and the Accused: Balance of Advantages in Criminal Procedure,* 69 Yale L. J. 1149, 1185-92 (1960). At the very least, a defendant in Mr. Nobles' position has the right to expect that his witnesses will be free to testify from their independent memory of facts crucial to the defense without fear that otherwise irrelevant notes will thereby be made available to the Government and scrutinized for matters which will discredit the witness and, as a result, the defense.

Implicit in the Fifth Amendment is the right to prepare and present a defense. *United States* v. *Burr,* 25 F. Cas. 30, 32 (No. 14, 692d) (Cir. Ct. of Va. 1807). The reversal of the Ninth Circuit in this case would place an impermissible burden on that right.

III

An investigator for the defense is not just any witness.

With minor exceptions, the arguments of *amicus* to this point apply with equal force to any witness for the defense. The facts of this case do not, however, involve merely "any witness." The witness whose testimony was

excluded was a defense investigator, a vital member of the defense team. Where the Government seeks to discover and use notes of a defense investigator, it must show an interest superior to the accused's Sixth Amendment right to a vigorous and effective defense.

Adequate factual investigation is clearly a component of effective assistance of counsel. *McQueen* v. *Swenson,* 498 F.2d 207, 216 (8th Cir. 1974); *United States* v. *Wright,* 489 F.2d 1181, 1188 n.6 (D.C.Cir. 1973); *Shepherd* v. *Hunter,* 163 F.2d 872 (10th Cir. 1957); Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Resources in Criminal Proceedings,* 55 Corn. L. Rev. 632 (1970).

The American Bar Association in setting standards for the provision of defense services to indigents concluded that the failure to provide adequate investigative support rendered any attempt to provide defense services *ipso facto* sub-standard. *A.B.A. Project on Standards for Criminal Justice, Standards Relating to Providing Defense Services* § 1.5 (Approved draft, 1968).

Additionally, in considering the elements of an adequate defense, the A.B.A. Project concluded:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case . . . regardless of the accused's admissions or statement to the lawyer of facts constituting guilt. *A.B.A. Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function* § 4.1 (Approved draft, 1971).

In a real sense, a criminal defendant's Fifth and Sixth Amendment privileges combine when the issue is the availability to the Government of a defense investigator's notes. Even the scattered state decisions arguably sup-

porting the Government's position[3] do not go so far. If an investigator has to worry about preparing notes and internal reports in such a fashion as to leave no room for expert cross-examination, the investigator's ability to function will be substantially impaired.

The Fifth Amendment commands that the Government bear its burden without help from the accused. The Sixth Amendment entitles the defendant to a vigorous and competent defense, including the benefit of a full factual investigation. It is immaterial whether the final product of that investigation is denominated "work product" or "privileged materials." It unduly strains the Fifth Amendment's protections to require that a defense investigator who wishes to testify on behalf of the defendant must automatically deliver to the Government prior notes on the subject of his testimony regardless of the defense's intention whether or not to use the material.

In attempting to pin down and name this class of evidence, it is possible to lose sight of the fact that what the Government is seeking is a rule which would require a defendant to present potentially useful information to the Government which the defendant never intended to use. The Fifth Amendment prevents that result.

---

[3] The cases are collected in *United States* v. *Wright*, 489 F. 2d 1181, 1190 n.11 (D.C. Cir. 1973). *See also People* v. *Chavez*, 33 Cal.App.3d 454, 109 Cal.Rptr. 157 (1973).

With the exception of New Jersey, none of the decisions have been followed in any reported case within the jurisdiction so far as their "Jencks-in-reverse" aspect is concerned.

CONCLUSION

For the reasons above, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

ROGER A. LOWENSTEIN,
Federal Public Defender,
976 Broad Street,
Newark, New Jersey 07102.

Counsel to Amicus,
Federal Public Defender of New Jersey.

Supreme Court, U. S.
FILED
APR 11 1975
MICHAEL RODAK, JR., CLERK

No. 74-634

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1974

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, THE NATIONAL LEGAL AID AND DEFENDERS ASSOCIATION, AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

John J. Cleary
Warren R. Williamson
Federal Defenders of San Diego, Inc.
925 First Avenue, Suite 260
San Diego, California 92101
Attorneys for Amici Curiae
(714) 234-8467

Of Counsel,

Mr. Sheldon Portman, Chairman
California Public Defenders Association
Santa Clara County Public Defender

Mr. James Doherty
Chairman, Amicus Committee
National Legal Aid and
Defender Association

Mr. Fred Okrand
Legal Director
American Civil Liberties Union
of Southern California

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1974

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, THE NATIONAL LEGAL AID AND DEFENDERS ASSOCIATION, AND THE AMERICAN CIVIL LIBERTIES UNION FOR SOUTHERN CALIFORNIA AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

INDEX

Page

Statement of Interest of Amici Curiae.... 1

Summary of Argument..... 2

Argument:

I. The report of the defense investigator was protected from disclosure to the government by the Fifth Amendment privilege against self-incrimination..... 4

A. The privilege against compulsory self-incrimination extends to the report of the defense investigator such that the respondent properly invoked its protection to prevent disclosure of that report..... 4

II. The trial court's order deprived respondent of his right to the effective assistance of counsel and his right to present witnesses under the Sixth Amendment..... 17

III. The order of the court in this case violated the principle of reciprocity outlined in Wardius v. Oregon..... 22

Conclusion..... 31

CITATIONS

Cases:	Page
Black v. United States, 385 U.S. 26 (1966)	21
Boyd v. United States, 116 U.S. 616 (1886)	9, 11
Branzburg v. Hayes, 408 U.S. 665 (1972)	5
Brown v. United States, 356 U.S. 148 (1957)	14
Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951)	17
Couch v. United States, 409 U.S. 322 (1972)	5, 6, 16
Counselman v. Hitchcock, 142 U.S. 547 (1892)	9, 11
Entick v. Carrington, 19 How. St. Tr. 1029 (1765)	7
Gilday v. Commonwealth, 274 N.E. 2d 589 (Mass. Sup. Jud. Ct. 1971)	22
Goldstein v. Great Atlantic and Pacific Tea Co., Fla., 118 So. 253 (1960)	10
Griffin v. California, 380 U.S. 609 (1965)	12
Harris v. New York, 401 U.S. 222 (1971)	8, 14
Henfield v. United States, 118 F.2d 375 (D.C. Cir. 1941)	17
Hoffa v. United States, 385 U.S. 293 (1966)	21
In re Oliver, 333 U.S. 257 (1948)	13
Jencks v. United States, 353 U.S. 657 (1957)	23
McGautha v. California, 402 U.S. 183 (1970)	9, 18
McMann v. Richardson, 397 U.S. 759 (1970)	12
Malloy v. Hogan, 378 U.S. 1 (1964)	12

Cases - Continued	Page
Menendez v. United States, 393 F.2d 312 (5th Cir. 1968)	23
Miranda v. Arizona, 384 U.S. 436 (1966)	5, 9
Murphy v. Waterfront Commission, 378 U.S. 52 (1964)	12
Nardone v. United States, 308 U.S. 338 (1939)	5
O'Brien v. United States, 386 U.S. 345 (1966)	21
Palermo v. United States, 360 U.S. 343 (1954)	23
People v. Bennett, 29 N.Y.2d 462 (1972)	18
Powell v. Alabama, 287 U.S. 45 (1932)	17
Prudhomme v. Superior Court, 2 Cal. 3d 1320, 85 Cal. Rptr. 129, 466 P.2d 673 (1970)	8
Raffle v. United States, 271 U.S. 494 (1925)	14
Reilly v. Berry, 250 N.Y. 456 (1929)	18
Rodriguez v. Superior Court, 9 Cal. App. 3d 493, 88 Cal. Rptr. 154 (1970)	22
Roe dem. Haldane v. Harvey, 4 Burr. 2489, 38 Eng. Rep. 302 (1769)	7
Schmerber v. California, 384 U.S. 757 (1966)	9, 11
Shephard v. Hunter, 163 F.2d 872 (10th Cir. 1947)	18
Sherbert v. Verner, 374 U.S. 398 (1963)	12
Simmons v. United States, 290 U.S. 377 (1968)	14
Specht v. Patterson, 386 U.S. 605 (1967)	13, 17
Spevack v. Klein, 385 U.S. 511 (1967)	12

Cases - Continued — Page

State v. Benner, 284 A.2d 91 (Maine Sup. Jud. Ct. 1971) 22
United States v. Augenblick, 393 U.S. 348 (1968) 23
United States v. Cohen, 388 F.2d 464 (9th Cir. 1967) 5, 11, 17
United States v. Fratello, 44 F.R.D 444 (1968) 11, 12
United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965) 24
United States v. Kovel, 296 F.2d 918 (2d Cir. 1971) 10, 20
United States v. Missler, 414 F.2d 1293 (4th Cir. 1969) 23
United States v. Nixon, 418 U.S. 683 (1974) 5
United States v. Nobles, 501 F.2d 146 (9th Cir. 1971) 1, 6, 16
United States v. Smaldone, 484 F.2d 311 (10th Cir. 1973) 23
United States v. White, 322 U.S. 694 (1944) 6
United States v. Wright, 489 F.2d 118 (D.C. Cir. 1973) 5, 6, 15
Warden v. Hayden, 387 U.S. 294 (1967). 11
Wardius v. Oregon, 412 U.S. 470 (1973) 3, 5, 18 22, 25 26, 28
Washington v. Texas, 388 U.S. 14 (1967) 13, 17
Williams v. Florida, 399 U.S. 78 (1969) 5, 6, 15

Constitution, Statutes and rules: — Page

United States Constitution:

Fifth Amendment..... 2, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 29, 30
Sixth Amendment..... 2, 13, 17, 30

18 U.S.C. 3500 (The Jencks Act). 3, 16, 20, 23, 26, 28, 30
18 U.S.C. 3500 (e) 23
18 U.S.C. 3500 (e)(1) 24

Federal Rules of Criminal Procedure:

Rule 16 20
Rule 29 7

Federal Rules of Evidence:

Rule 501 10
Rule 612 ..... 26, 27, 28
Rule 613 26
Rule 613(A) 26

Miscellaneous:

A.B.A. Project on Standards for Criminal Justice, Standards Relating to the Defense Function, §4.1 (Approved Draft 1971)..... 18

A.B.A. Standards of Discovery and Procedure Before Trial Supplement, 5-6 (Approved Draft, October 1970) 22

Miscellaneous - Continued Page

Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? 1963 Wash. U.L.Q. 279, 280 (1963).... 30

Freeman, The Public Defender System, J. Amer. Jud. Soc. 74 (1948) 19

Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149 (1960) 7

Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53 Calif. L. Rev. 89 (1965) 7

Moore, Criminal Discovery, 19 Hastings L.J. 865 (1968) 12, 13

Note, Agents Reports and the Attorney-Client Privilege, 21 U. Chi. L. Rev. 752 (1954) 10

Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv. L. Rev. 994 (1972) 13, 19

Note, Right to Aid in Addition to Counsel for Indigent Defendants, 47 Minn. L. Rev. 1054 (1963)... 18

Note, The Indigent's Right to Adequate Defense: Expert and Investigatorial Resources in Criminal Proceedings, 55 Corn. L. Rev. 632 (1970) 18

Miscellaneous - Continued Page

Sevilla, The Exclusionary Rule and Police Perjury, 11 S.D.L.Rev. 839 (1974) 20

The Preclusion Sanction - A Violation of the Constitutional Right to Present a Defense, 81 Yale L.J. 1342 (1972) 13

Wilkerson, Public Defenders As Their Clients See Them, 1 Am. J. of Crim. L. 141 (April 1972) 21

1974 U.S. Code Cong. and Ad. News, Vol. 12A (15 January 1975) 11

STATEMENT OF INTEREST OF AMICI CURIAE

The California Public Defenders Association is a non-profit corporation incorporated under the laws of the State of California in 1969. The purpose of the association is to assist public defender offices in California, whether state or federal, in their ongoing efforts to provide effective representation for indigent criminal defendants. In this regard, the association is vitally concerned with any action which might have a substantial impact upon the rights of their clients and upon their ability as defense attorneys to protect these rights.

The American Civil Liberties Union of Southern California is a non-profit organization dedicated to the preservation of the personal guarantees of the Bill of Rights of the United States Constitution. The ACLU is, therefore, concerned with any decision of this Court which may effect the constitutional rights of any citizen or group of citizens.

The National Legal Aid and Defenders Association has a nationwide membership including legal aid and public defender offices as well as individual attorneys who are concerned with providing access to effective legal services to the poor. Because of their focus on the representation of indigents, and their position as a national association, NLADA is actively involved in providing input into action, legislative or judicial, which may be of consequence to the clients they represent.

Amici are extremely concerned over the outcome of the case at bar because of their common desire to see the important constitutional rights of citizens protected. The organizations involved in this brief feel that the decision of the United States Court of Appeals for the Ninth Circuit in United States v. Nobles, 501 F.2d 146 (9th Cir. 1974) was proper. Were the order of the trial court upheld, it would

have disastrous and destructive impact on the Fifth and Sixth Amendment rights of the criminally accused, on the ability of defense attorneys to effectively represent their interests, and provide an unfair and unconstitutional advantage to the prosecution in federal criminal trials.

Amici fully agree with the position of the respondent that the order of the trial court at issue here was improper and that the decision of the Court of Appeals was correct. This brief is submitted in support of that judgment.

SUMMARY OF ARGUMENT

The order of the trial court which was held to be reversible error by the Court of Appeals violated respondent's Fifth Amendment privilege against self-incrimination. Respondent's privilege, which extended to the defense investigator because of his close relationship to respondent's cause, protected the investigator's notes from disclosure to the prosecution. Although the notes were not the words of respondent as such, they were testimonial in nature, and, therefore, were covered by the Fifth Amendment. The trial court's order that the investigator either agree to surrender his notes (which related to an interview of prosecution witnesses) or forego the opportunity to testify, forced respondent to choose between giving up his Fifth Amendment right not to incriminate himself and his Sixth Amendment right to present witnesses in his behalf. This choice is constitutionally impermissible and amounts to a form of "compulsion." Because he himself did not testify, respondent did not waive any objection he might have had to this procedure by calling the investigator as a witness.

By precluding the use of the investigator's testimony regarding his interview with the prosecution witnesses, the court violated respondent's Sixth Amendment right to present witnesses and to

challenge the government's case. The inability to present this evidence also denied respondent his right to the effective assistance of counsel. If the trial court's order is permitted to stand, the Court's decision in that regard could have a detrimental impact on the ability of attorneys, particularly appointed counsel, to provide effective representation for those accused of criminal conduct.

Finally, the order of the trial court violated the principles outlined in Wardius v. Oregon, 412 U.S. 470 (1973), because it gave the prosecution access to discovery from respondent which respondent had no reciprocal right to demand from the prosecution. The investigator's report did not constitute his "statement" within the meaning of the Jencks Act, 18 U.S.C. 3500, and therefore a similar report in the hands of a government witness would not have been discoverable by respondent under the provisions of that Act.

I

THE REPORT OF THE DEFENSE INVESTIGATOR WAS PROTECTED FROM DISCLOSURE TO THE GOVERNMENT BY THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

A. The Privilege Against Compulsory Self-Incrimination Extends to the Report of the Defense Investigator such that the Respondent Properly Invoked its Protection to Prevent Disclosure of that Report.

The petitioner argues that the order of the trial court requiring that, as a condition precedent to testifying, the defense investigator from the Federal Public Defender's office agree to surrender to the prosecution his notes of the interview with the eyewitness did not violate respondent's Fifth Amendment right not to incriminate himself. This contention is based on two premises. First, the respondent's Fifth Amendment privilege does not extend to the notes of the investigator, and second that, even if the notes were covered by the privilege, respondent was not compelled to disclose them, and would have waived any objection to their introduction by putting the investigator on the stand. (Brief for Petitioner at 44-45, 52-54)

Dealing with these arguments in order, we confront at the outset what is perhaps the most significant issue in this case: Can a member of the defense team as closely allied to the defendant's cause as the defense investigator be compelled to disclose evidence which may tend to incriminate the accused?

In attempting to answer this question, this

court finds itself again facing the problem of resolving the conflict between the "search for truth" in criminal trials and the need to guarantee that a defendant in a criminal trial not be compelled to assist the State in proving his guilt. Wardius v. Oregon, 412 U.S. 470 (1973); Williams v. Florida, 399 U.S. 78 (1969). In a recent opinion dealing with this troubling point, the Court noted:

> "The public. . .has a right to every man's evidence except for those persons protected by a constitutional, common law, or statutory privilege."

United States v. Nixon, 418 U.S. 683, 709 (1974) (citing Branzburg v. Hayes, 408 U.S. 665, 688 (1972)).

In light of this standard, the critical question is one of whether the "constitutional privilege" afforded respondent by the Fifth Amendment protected from disclosure to the government the notes of the investigator, despite their potential relevance in the search for truth at the trial. There is no question that the fact that evidence may be relevant is not alone enough to require disclosure of that evidence when disclosure would violate an over-riding public policy to protect an individual's constitutional rights. Nardone v. United States, 308 U.S. 338, 340 (1939). Cf. Couch v. United States, 409 U.S. 322 (1972); Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Wright, 489 F.2d 118 (D.C. Cir. 1973); United States v. Cohen, 388 F.2d 464 (9th Cir. 1967). The principle has been expressed often and in the context of the issue now before the court, no better than this:

> "The defendant has a right under the Fifth Amendment to compel the state to investigate its own case, find its own evidence, and prove its own facts. The defense has no duty to help the prosecution convict the defendant

> We therefore reject any rule which would require the defense to turn over to the prosecution prior statements of defense witnesses which could be used by the prosecution as evidence against the accused."

United States v. Wright, supra at 1195. See Couch v. United States, 409 U.S. 322 (1972); Williams v. Florida, supra at 112 (Black and Douglas, J.J., dissenting); United States v. White, 322 U.S. 694, 698 (1944); United States v. Nobles, 501 F.2d 146, 155 (9th Cir. 1974).

The rationale for this position is a familiar one and is the same as that which was the basis for the inclusion of the Fifth Amendment by the Framers in the Bill of Rights.

> "Historically, the privilege sprang from an abhorrence of governmental assault against a single individual accused of crime and the temptation on the part of the State to resort to the expedient of compelling incriminating evidence from one's own mouth. United States v. White, [supra]. The Court has thought the privilege necessary to prevent any 'recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.'"

Couch v. United States, supra at 327.

This concept of not forcing from the accused evidence which may damage his cause is rooted deep

in our common law tradition.[1] Commentators have expressed real concern that the trend in recent years of allowing the State greater access to the defendant's case may lead to the excesses which the Fifth Amendment was designed to prevent.[2]

Petitioner argues that the respondent was not being required to "help the prosecution" convict him because they were not seeking to introduce the investigator's reports in their case in chief, and had already met the initial burden of establishing a prima facie case against respondent sufficient to meet the challenge of a motion for judgment of acquittal under Rule 29, Federal Rules of Criminal Procedure. (Brief for Petitioner at 56-57) The fallacy of this argument lies in its

---

1 "[I]n civil causes, the Court will force parties to produce evidence which may prove against themselves; or leave the refusal to do it (after proper notice) as a strong presumption to the jury **** But in a criminal or penal cause, the defendant is never forced to produce any evidence; though he should hold it in his hands in court."

Roe dem. Haldane v. Harvey, 4 Burr. 2489, 38 Eng. Rep. 302, 305 (K.B. 1769); cf. Entick v. Carrington, 19 How. St. Tr. 1029 (1765).

2 Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53 Calif. L.Rev. 89 (1965); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149 (1960)

apparent assumption that any evidence introduced by the government following the close of their case in chief, no matter how incriminating, does not figure in the mind of the trier of fact when considering the issue of guilt or innocence. Anyone familiar with trial practice knows that this is not the case. See Harris v. New York, 401 U.S. 222 (1971). Experienced prosecutors are well aware of the strategic impact of a strong rebuttal case as are the courts. In setting forth a standard for determining whether an accused's Fifth Amendment rights were being violated by a discovery order, the California Supreme Court observed:

> "The privilege forbids compelled disclosures which could serve as 'link in a chain' of evidence tending to establish guilt of a criminal offense. . . ."

Prudhomme v. Superior Court, 2 Cal. 3d 320, 325, 326, 85 Cal. Rptr. 129, 131, 466 P.2d 673, 677 (1970).

The emptiness in the constitutional sense of any distinction between incriminating evidence that is introduced against a defendant during the prosecution's case in chief, and incriminating evidence used at later stages in the trial is well recognized:

> "The privilege against self-incrimination protects the individual from being held to incriminate himself in any manner. . . [S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial. . . . These statements are incriminating in any meaningful sense of the word. . . ."

Miranda v. Arizona, 384 U.S. at 476-477.[3]

Petitioner argues that even assuming that the materials sought from the defense investigator in this case could have incriminated respondent by serving as a "link in a chain" of evidence tending to establish his guilt, that the investigator was not covered by the privilege. A careful examination of both the nature of the coverage afforded by the Fifth Amendment and the relationship between defense investigator and the defendant's interests shows that the privilege does extend to prevent disclosure such as was ordered by the trial court here.

On the first point it is important to remember that ". . . the protection of the privilege 'is as broad as is the mischief against which it seeks to guard.'" Schmerber v. California, 384 U.S. 757, 764 (1966) (citing Counselman v. Hitchcock, 142 U.S. 547, 562 (1892)). Mindful of this fact, and of the "duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon," Boyd v. United States, 116 U.S. 616, 635 (1886), it has been observed that ". . . the Fifth Amendment marks 'a zone of privacy' which the government may not force a person to surrender." Schmerber, supra at 778 (Douglas, J., dissenting)

---

3 On this point it has been observed:

> ". . . [A] defendant whose motion for acquittal at the close of the Government's case is denied must decide whether to stand on his motion or put on a defense, with a risk that in so doing he will bolster the Government case enough for it to support a verdict of guilty."

McGautha v. California, 402 U.S. 183, 215 (1970).

Given the close relationship between the investigator for the defense and the accused's interests, it is clear that the reports of the investigator were within this "zone of privacy" and were protected from disclosure by respondent's privilege against self-incrimination. The proximity of this relationship is evident by the fact that, in the opinion of many authorities, investigators are included within the coverage of the attorney-client privilege. See e.g., United States v. Kovel, 296 F.2d 918 (2d Cir. 1961); Goldstein v. Great Atlantic and Pacific Tea Co., Fla., 118 So. 253 (1960); Note, Agents Reports and the Attorney-Client Privilege, 21 U. Chi. L. Rev. 752, 753 (1954). In fact, as originally proposed by the Senate, the Federal Rules of Evidence, Rule 503, included within the lawyer-client privilege anyone ". . .employed to assist the lawyer in the rendition of professional legal services." The final version of the Rules, which are now in effect, does not include the specific privileges. All that remains is Rule 501 which provides in pertinent part:

> "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

In commenting on Rule 501, and the deletion of the specific privileges from the final version of the Rules, the Senate Report noted:

> "It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should

> not be understood as disapproving any recognition of a psychiatrist, patient or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our actions should be understood as reflecting the view that recognition of a privilege based on confidential relationship and other privileges should be determined on a case-by-case basis."

1974 U.S. Code Cong. and Ad. News, Vol. 12A at 48-49 (15 January 1975).

Petitioner also contends, if somewhat obliquely, report of the investigator was not "testimonial" in character and therefore its disclosure is not protected by the Fifth Amendment. Schmerber v. California, 384 U.S. 757 (1966). This position does not comport with the requirement that constitutional provisions which protect personal rights be given a "liberal construction." Counselman v. Hitchcock, supra at 584-585. It also fails to consider that in the context of the case at bar, the order of the trial court would have required divulging the contents of a report which is, in itself, obviously of a testimonial nature. Boyd v. United States, supra; United States v. Cohen, 388 F.2d 464 (9th Cir. 1967); United States v. Fratello, 44 F.R.D. 444 (1968). Cf. Warden v. Hayden, 387 U.S. 294 (1967); Schmerber v. California, supra.

B. The Respondent was Impermissibly Compelled to Surrender the Investigator's Report by the Trial Court's Order and His Calling of the Investigator as an Impeaching Witness Did Not Constitute a Waiver of His Fifth Amendment Privilege as to the Reports.

Petitioner argues that, even if the defense investigator's report of his interview with the eyewitnesses was covered by respondent's Fifth Amendment privilege, there was no impermissible compulsion, in the constitutional sense, for defendant to surrender these reports. Instead, it is asserted, respondent waived any objection he might have had by calling the investigator as a witness. On the first point, the Petitioner claims that "the Court's order did not create the kind of compulsion 'likely to exert such pressure upon an individual as to disable him from making a full and rational choice.'" and that therefore the Fifth Amendment is not implicated. (Brief for Petitioner at 49-50, citing McMann v. Richardson, 397 U.S. 759, 769 (1970)).

This position ignores reality as well as legal precedent. First, it has long been held that requiring a person, particularly a criminal defendant, to abandon important constitutional rights in order to gain some other benefit, is a form of compulsion. Murphy v. Waterfront Commission, 378 U.S. 52 (1964); Sherbert v. Verner, 374 U.S. 398, 403-406 (1963). See also Moore, Criminal Discovery, 19 Hastings L.J. 865, 912-913 (1968). To say that criminal trial strategy sometimes requires "the making of difficult decisions" is no answer, for the courts have specifically held that options which exact a penalty upon the exercise of the privilege against self-incrimination violate the Fifth Amendment. United States v. Fratello, supra; cf. Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964). And, as noted in Spevack v. Klein,

> "In this context 'penalty' is not restricted to fine or imprisonment. It means. . . the imposition of any sanction which makes the assertion of the Fifth Amendment privilege 'costly'. . . ."

385 U.S. 511 at 515 (1967).

In this case, the respondent was given a choice between exercising his Sixth Amendment right to effectively confront and cross examine the witnesses who testified against him, the eyewitnesses, by presenting evidence through the investigator that might have impeached their credibility, and exercising his Fifth Amendment right not to incriminate himself. There is, of course, no question that an accused's right to confront and cross examine witnesses who testify against him is a minimum requirement of due process. In re Oliver, 333 U.S. 257, 273 (1948); Washington v. Texas, 388 U.S. 14, 18 (1967); Specht v. Patterson, 386 U.S. 605 (1967).

To preclude respondent from exercising this right was certainly a sanction of the most significant proportions and to require him to choose between the Sixth and Fifth Amendment rights confronts him with the kind of dilemma that rises to the level of constitutionally impermissible compulsion. [4] In discussing the problem confronting an accused faced with the choice of complying with court-ordered discovery which might incriminate him, or foregoing altogether the presentation of evidence which could be critical to his defense, one commentator noted:

> "[S]ince the evidence or witnesses involved might provide incriminating as well as exculpatory information, the defendant would be placed between the Scylla of providing the prosecutor with potentially incriminating information and the Charybdis of being precluded from offering elements of his defense."

Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv. L. Rev. 994, 998 (1972).

---

4 The Preclusion Sanction - A Violation of the Constitutional Right to Present a Defense, 81 Yale L.J. 1342, 1354 (1972); Moore, Criminal Discovery, 19 Hastings L.J. 865, 912, 913 (1968).

By putting respondent in this position the trial court's order clearly created that kind of intolerable tension between constitutional rights which has been condemned by this Court. Simmons v. United States, 290 U.S. 377, 394 (1968).

Petitioner argues, however, that respondent has no standing to claim compulsion because his decision to call the defense investigator as a witness effectively waived any claim he might have had to the protection of the Fifth Amendment privilege as to the investigator's report. In support of this contention, petitioner cites a series of cases which deal with the concept of waiver of the privilege against self-incrimination. Of these cases, a number deal with situations where the accused himself elected to take the stand, thus exposing himself to cross examination. Harris v. New York, supra, McGautha v. California, 402 U.S. 183 (1970); Brown v. United States, 356 U.S. 148 (1957); Raffle v. United States, 271 U.S. 494 (1925). This case of course does not present the same situation. The incriminatory information would not have been made available to the prosecution because respondent chose to testify, but because he called a witness, the investigator.

The circumstances under which the investigator was called also points up a flaw in petitioner's waiver argument. In commenting on the cases where this Court has upheld notice-of-alibi statutes, which cases are relied upon by petitioner here in support of its position, the United States Court of Appeals for the District of Columbia observed:

> "There has been some attempt in recent years to increase the government's right to discovery in criminal cases - for example, through statutes requiring the defense to give pretrial notice of the names of witnesses to be

> called as part of an alibi defense. But as the Supreme Court has emphasized in holding such statutes constitutional under the Fifth Amendment, they only require the defense to turn over to the government information which the defense intends to reveal at trial. See Williams v. Florida, 399 U.S. 78, 85, (1970). Alibi statutes, the Court reasoned, affect only the timing of disclosure, and the defendant has no Fifth Amendment privilege to mount an eleventh hour defense. Id. at 82. The government's proposal in the instant case is entirely different. It would require the defense to turn over information which the defense never intended to use at trial."

United States v. Wright, 489 F.2d 1181, 1194 (D.C. Cir. 1973) (footnotes ommitted).

Similarly, the trial court's order in this case would have required respondent to disclose albeit during trial, information which he could not have intended before trial to use. The distinction which must be looked to exists between an accused's right to present a defense, and his right to challenge the government's case against him. In the former situation, with which the government's "waiver" cases deal, the affirmative presentation of evidence may well be considered sufficiently voluntary to

constitute a constitutionally-recognized relinquishment of privilege. [5] In the latter situation, the accused is entitled to challenge the government's case by cross examination, impeachment and surrebuttal, without ever offering evidence himself, or taking the stand. There was no way that respondent, given the Jencks Act, 18 U.S.C. 3500, could have planned to call the investigator for impeachment purposes until after the eyewitnesses had testified and, on cross examination, denied making their earlier statements.

---

5 The petitioner offers Couch v. United States, 409 U.S. 322 (1972) in support of the "waiver" argument.

In Couch the situation is distinguishable from that in Nobles. There the accused's voluntary relinquishment of incriminating documents to an accountant, who was not an employee of either the accused or his attorney, was held to prevent the assertion of the accused's privilege against self-incrimination as to those documents. In this case there was no "relinquishment" of the reports to the investigator, and the reports were prepared specifically for the purpose of assisting the accused in this case.

II

THE TRIAL COURT'S ORDER DEPRIVED RESPONDENT OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHT TO PRESENT WITNESSES UNDER THE SIXTH AMENDMENT.

The order of the trial court precluded respondent from offering impeachment evidence, and thus denied him the opportunity to effectively confront and cross examine the government eyewitnesses who placed him at the scene of the crime, certainly a critical element of proof in the case against him. By denying respondent this opportunity the trial court denied him also his constitutionally guaranteed right to the effective assistance of counsel and the right to present witnesses. Washington v. Texas, 388 U.S. 14 (1967); Specht v. Patterson, 386 U.S. 605 (1967); Powell v. Alabama, 287 U.S. 45 (1932); Coplon v. United States, 191 F. 2d 749, 757 (D.C. Cir. 1951); Henfield v. United States, 118 F. 2d 375 (D.C. Cir. 1941) Cross examination of the eyewitnesses was a nullity absent the ability to present, through the investigator, the evidence of their prior inconsistent statements.

The trial court's order, if permitted to stand, could have far broader implications that its mere application to the respondent. As pointed out in United States v. Cohen:

> "An attorney is his client's advocate. His function is to raise all the just and meritorious defenses his client has." 388 F. 2d at 467.

Today it is increasingly apparant that "adequate factual investigation is clearly a component of effective assistance of counsel . . . ." United States v. Wright,

supra at 1188 n. 6.[6] This is particularly true in light of the vastly superior resources of the government as compared to the accused's which give it a correspondingly greater investigative ability. Wardius v. Oregon, supra at 475 n. 9. Mr. Justice Douglas commented on this problem in his concurring opinion in Wardius where he said:

> "The Bill of Rights does not envision an adversary proceeding between two equal parties. If that were so, we might well benefit from procedures patterned after the Rules of the Marquis of Queensberry. But, the Constitution recognized the awesome power of indictment and the virtually limitless resources of government investigators. Much of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution. It is not for the courts to change that balance." 412 U.S. at 480.[7]

It is because of these realities that investigative services have been cited as one of the "chief assets" of defender offices. Freeman, The Public Defender System, J. Amer. Jud. Soc. 74, 76 (1948)

Yet now, even the little evidence that defender service investigators are able to obtain from government witnesses is held up as so inherently lacking in veracity (see Brief for Petitioner at 27 n. 11) that the production of their reports is made a condition

---

6 See e.g., Shephard v. Hunter, 163 F. 2d 872 (10th Cir. 1967); People v. Bennett, 29 N.Y. 2d 462 (1972); A.B.A. Project on Standards for Criminal Justice, Standards Relating to the Defense Function, § 4.1 (Approved Draft 1971). Providing such investigative assistance for the indigent defendant has proved difficult. See e.g. Reilly v. Berry, 250 N.Y. 456, 461 (1929); Note, The Indigent's Right to Adequate Defense: Expert and Investigatorial Resources in Criminal Proceedings, 55 Corn. L. Rev. 632 (1970); Note, Right to Aid in Addition to Counsel for Indigent Defendants. 47 Minn. L. Rev. 1054 (1963).

7 One commentator has noted:

> "Besides greater financial and staff resources in which to investigate and scientifically analyze evidence, the prosecutor has a number of tactical advantages. First, he begins his investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events. In addition to the advantage of timing, the prosecutor may compel people, including the defendant, to cooperate. Finally, respect for government authorities will cause many people to cooperate with the police or prosecutor voluntarily when they might not cooperate with the defendant." Note, Prosecutorial Discovery under Proposed Rule 16, 85 Harv. L. Rev. 994, 1018-1019 (1972)

precedent to their giving testimony in impeachment.[8] *Petitioner is in reality asking* that production of notes be made an essential element of the competence of a defense investigator as a witness. The government counterparts of defense investigators certainly do not find themselves similarly impugned by such a requirement. It is true, that if a verbatim report was made of a government witness's statement, a different situation might exist, but then the protection of Rule 16, Federal Rules of Criminal Procedure and the Jencks Act would apply.

There is no question but that if an order such as that of the trial court in this case were held to be permissible, that it could cause a serious disruption in the ability of defense counsel who regularly rely on investigators to help prepare their case, to adequately prepare for trial, particularly in situations involving complex factual issues. It is not unreasonable to foresee that investigators, fearful of disclosure of their reports, may cease to memorialize the results of their efforts. The delay between the time of their investigation and the time of trial could easily affect their ability to remember import- and facts which were of importance to the defense. Cf. United States v. Kovel, 296 F. 2d 918, 921 (2d Cir. 1961).

---

8 It is also interesting to note petitioner's contention that disclosure such as ordered by the trial judge here would help prevent perjury on the part of defender office investigators when the availability of discovery to the defense seems not in all cases to have corrected the same problem insofar as government investigators are concerned. See Sevilla, The Exclusionary Rule and Police Perjury, 11 S. D. L. Rev. 839 (1974).

In addition, it requires little imagination to picture *what regular disclosure of reports to the* prosecution by a member of the defense team would do to what is often an already-strained relationship between appointed counsel and his client.[9] It is no small irony that the availability of effective investigative services which is considered an advantage to the defendant suddenly becomes a disadvantage if an order such as that of the trial court in this case makes material for use by the prosecution. The position of the investigator as a member of the defense team is too closely identified with the interests of the accused to permit a disclosure such as was ordered by the trial court. Cf. Hoffa v. United States, 385 U.S. 293 (1966); O'Brien v. United States, 386 U.S. 345 (1966); Black v. United States, 385 U.S. 26 (1966).

---

9 Wilkerson, Public Defenders As Their Clients See Them, 1 Am. J. of Crim. L. 141 (April 1972).

III

THE ORDER OF THE COURT IN THIS CASE VIOLATED THE PRINCIPLE OF RECIPROCITY OUTLINED IN WARDIUS V. OREGON.

This Court's opinion in Wardius v. Oregon, supra, dealt with the question of reciprocal discovery under a notice-of-alibi statute. In Wardius, it was held that the Oregon notice-of-alibi statute was unconstitutional because it precluded an accused from presenting alibi evidence as a sanction for failing to notify the prosecution prior to trial of who the alibi-witnesses would be. The statute was held to be unconstitutional because it failed to provide the accused the right to reciprocal discovery of the State's rebuttal witnesses. [10] It was pointed out that:

> "The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." 412 U.S. at 475.

It is clear, when analyzing the situation that presents itself here that the order of the trial court violated this principle.

The Jencks Act, 18 U.S.C. 3500, was passed by Congress in response to a concern by the government that this Court's decision in Jencks v. United States, 353 U.S. 657 (1957), would allow defendants too great access to government investigator's reports. See Palermo v. United States, 360 U.S. 343 (1954). Because of this concern, cases which have interpreted the Act have carefully limited its coverage. Only reports which can fairly be said to be the witness's own statement, a "substantial verbatim record" of the witness's words rather than an investigator's interpretation of a witness's words, are subject to disclosure to the defense. 18 U.S.C. 3500(e). Cf. United States v. Augenblick, 393 U.S. 348 (1968); Palermo v. United States, supra at 352; United States v. Smaldone, 484 F.2d 311 (10th Cir. 1973); United States v. Missler, 414 F.2d 1293 (4th Cir. 1969); Menendez v.

---

10 On the advisability of ever preventing an accused from presenting evidence as a sanction for non-compliance with a court-ordered discovery rule, see Rodriguez v. Superior Court, 9 Cal. App. 3d 493, 88 Cal. Rptr. 154 (1970); State v. Benner, 284 A.2d 91 (Maine Sup. Jud. Ct. 1971); Gilday v. Commonwealth, 274 N.E. 2d 589 (Mass. Sup. Jud. Ct. 1971). The American Bar Association was able to conclude that the sanctions in situations of non-compliance with an alibi-notice requirement should not include the denial of the right of the accused to offer evidence. A.B.A. Standards of Discovery and Procedure Before Trial Supplement, 5-6 (Approved Draft, October 1970).

United States, 393 F.2d 312 (5th Cir. 1968). [11] Reports which do not meet this standard are protected from disclosure to the defense under the Act even if a government witness testifies during trial. United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965).

Petitioner appears to contend that a type of "reverse Jencks Act" should apply in this case to require defense witnesses to surrender to the prosecution copies of any prior statements they

---

11 18 U.S.C. 3500(e)(1) provides:

"The term statement, as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means---

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement. . . ."

have made upon completing their testimony. (Brief for Petitioner at 25) [12]

This requirement, it is argued, is mandated by the concept of fairness: What the defense is entitled to, the government should be as well; as well as the need for criminal trials to be a "search for truth."

Amici recognize that the task of the prosecution would be easier if they could have unrestricted access to defense files. But, apart from the concerns expressed in the preceding arguments, and the fact that such a result was not within the contemplation of Congress, United States v. Wright, supra at 1190, this practice at least insofar as it may be a justification for the court's order in this case, ignores the decision in Wardius v. Oregon, supra which holds that "fundamental fairness" requires that discovery, particularly that which flows from the defense to the prosecution, be reciprocal.

There was no evidence that the investigator's report was a "substantial verbatim record" of any prior statement of his. In fact there is nothing in the record which reflects that the investigator said

---

12 That this rationale is the basis for the trial court's ruling is apparent from a reading of the proceedings below. The following comment of the trial judge underscores this fact:

"It seems only fair, if the government gives you copies of all the statements made. I think that the government is entitled, in view of the attempt at least of impeachment to see a copy of the statement that this witness made."

Brief for Petitioner at 11.

anything about the eyewitnesses. The indication is to the contrary, that the report sought contained statements of the government witness not of the investigator. (Brief for Petitioner at 8-12) Thus if the court's order in this case were permitted to stand, the government would be entitled to discovery of reports prepared by defense investigators, whether or not they were "statements" within the meaning of the Jencks Act, while the defense would not have a similar right of disclosure from prosecution witnesses. This result is impermissible under Wardius.

The petitioner also argues that the order of the trial court was consistent with the new Federal Rules of Evidence, Rule 613(a), discussed by petitioner, provides:

> "In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown or its contents disclosed to him at that time, but on request the same shall be shown to opposing counsel."

Aside from the fact it was not in effect at the time that the events in this case occurred, Rule 613 does not affect the impropriety of the court's order. Even in the unlikely event that Rule 613 had some broadening impact on the application of the Jencks Act, the fact remains that the court's order required respondent to submit to a form of discovery impermissible under Wardius.

It is also contended that since Rule 612 of the Federal Rules of Evidence may have made the investigator's notes discoverable, the order of the

trial court was proper.[13] This argument, of course, has no application in the present situation because Rule 612 applies only to writings used by witnesses to refresh their memory either, "(1) while testifying, or (2) before testifying. . . ." A reading of the record discloses no evidence that the defense investigator had used his notes or would have used his notes to refresh his memory. Petitioner argues that "If Bond [the defense investigator] refreshed his recollection by reviewing his report before testifying. . . ." his report may

---

13 It is by no means evident that petitioner's argument in this regard is a tenable one. A reading of Rule 612 reveals that no sanctions are provided for an accused's failure to comply with its provisions, while failure of the prosecution to comply with the Rule can result in the striking of testimony or the declaring of a mistrial. This difference can be interpreted as a reflection of an intent on the part of the drafters not to make available any sanctions for non-compliance by the accused. See footnote 18, supra. This question should and need not be decided here because it is not even implicity presented in the record.

have been discoverable. (Brief for Petitioner at 42)[14] But this possibility, and that is all it is, is of no help to petitioner's position:

> "[I]t misses the point to argue that since the government might obtain

---

14 Petitioner invites this Court to presume that the defense investigator must have reviewed his notes prior to testifying or, alternatively, to hold that "a trial court might have inherent power to demand that the investigator refresh his recollection as a pre-condition to testifying" (Brief for Petitioner at 43 n. 23) thereby rendering the investigator's notes discoverable under Rule 612. Amici is tempted, totally as a conjectural matter, to accept this invitation, as a patent violation of the Wardius reciprocity principle would result. The Jencks Act has been interpreted to render only substantially verbatim accounts of government investigators producible while the petitioner's suggestion would render all defense investigator's account producible. This lack of reciprocity would clearly contravene Wardius.

BEST COPY AVAILABLE

> the papers by another means it should be permitted to compel the possessor to produce them over his claim of privilege - that the government might obtain these documents without compelling [the defendant] to incriminate himself is hardly a justification for compelling [him] to incriminate himself. We cannot ignore the dictates of the Fifth Amendment on the ground that it would be more convenient or efficient to do so."

United States v. Cohen, 388 F. 2d 464, 469 (9th Cir. 1967).

The order of the trial court here was in error as it has no support in statute or in case law, and, most importantly, because it required the defendant to be the source of information that could be used to convict him. On this point, the comments of Mr. Justice Brennan in discussing the rationale behind excluding evidence from criminal prosecutions obtained at the expense of constitutional guarantees are of significance:

> "Too many of us seem to have forgotten the true office of the constitutional procedural safeguards. . .We have forgotten that these safeguards, while they do indeed make harder the conviction of an accused, were not provided for that purpose -- the Framers of the Constitution weren't 'soft on criminals.' These safeguards are a check upon government -- to guarantee that government shall remain the

servant and not the master of us all."[15]

Until the "shield" provided government witnesses by the Jencks Act is removed by legislation, an order such as that proposed by the trial court denies the accused statutory parity with the prosecution in the area of discovery. That Congress failed to enact legislation providing for compelled disclosure by a member of the defense team of evidence which might damage the cause of the accused, may well be a recognition of the fundamental guarantees of the Fifth and Sixth Amendments.

---

15 Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? 1963 Wash. U. L. Q. 279, 280 (1963)

CONCLUSION

For the foregoing reasons, as well as those contained in respondent's brief, amici respectfully submit that this Court affirm the decision of the Court of Appeals.

John J. Cleary
Warren R. Williamson
Federal Defenders of San Diego, Inc.
925 First Avenue, Suite 260
San Diego, California 92101
Attorneys for Amici Curiae

Of Counsel,

Mr. Sheldon Portman, Chairman
California Public Defenders Association
Santa Clara County Public Defender

Mr. James Doherty
Chairman, Amicus Committee
National Legal Aid and
Defender Association
Cook County Public Defender

Mr. Fred Okrand
Legal Director
American Civil Liberties Union
of Southern California



THE BRIEF SHOP

10844 VENTURA BOULEVARD
NORTH HOLLYWOOD, CA. 91604

LAWYERS BRIEF SERVICE
LEGAL & COMM. PRINTING

(213) 877-8620 763-2965

Produced By Copy-Print Method